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Towards an Understanding of Litigation as Expression: Lessons from Guantánamo

Kathryn A. Sabbeth*

Civil rights litigation has been recognized for over fifty years as core First Amendment activity, but governments often censor indirectly that which they cannot censor outright. In the War on Terrorism, the U.S. government has imposed indirect burdens on First Amendment freedoms and access to courts. This Article explores prior Supreme Court jurisprudence interpreting litigation as political expression and asks to what extent this doctrine can survive today. The Article focuses on the chilling effects of the Terrorist Surveillance Program ("TSP"), a warrantless wiretapping program imposed shortly after 9/11. Prior literature on the TSP has focused largely on individual rights protected by the Fourth, Fifth, and Sixth Amendments, but this Article highlights the First Amendment values at stake and, in particular, examines the First Amendment implications of wiretapping lawyers. Rather than utilize existing First Amendment theory to interpret the effects of the TSP, however, this Article turns the inquiry around. Drawing on a case study of twenty-three Guantánamo lawyers who believe they were targeted for surveillance, the Article explores the First Amendment theory of litigation as expression. The Article concludes that attorneys' communications in support of litigation reflect fundamental First Amendment values tied to political expression, but implementing protection for lawyers'

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communications presents significant doctrinal challenges, particularly with respect to defining the scope of litigation to be recognized as political and the type of communications to be included within the constitutional protection. The Article proposes a five-factor test to assist courts with identifying litigation that qualifies as political expression and proposes future research on the implications of recognizing First Amendment values in lawyers' work.

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INTRODUCTION

Providing “expert advice or assistance” to a terrorist organization constitutes a federal crime.¹ In *Holder v. Humanitarian Law Project*,² the Supreme Court upheld the constitutionality of this restriction as applied to two U.S. citizens and six human rights organizations that had, inter alia, offered training in the negotiation of peace agreements and preparation of petitions to the United Nations.³ The Court ruled that this statutory ban violated none of the plaintiffs’ free speech or association rights.⁴

A question the Supreme Court did not reach, though the Ninth Circuit had considered it below,⁵ was whether the language of the statute prohibited the filing of an amicus brief.⁶ It is not surprising that the Court steered clear of such territory. Had the Court upheld a prohibition on litigation by political organizations advocating for civil rights, it would have run into conflict with *NAACP v. Button*⁷ and its progeny,⁸ under which, for more than half a century, it has been well settled that such advocacy is highly protected as core First Amendment activity.

As others have demonstrated, however, government actors often censor indirectly that which they cannot forbid outright, and in periods of war and national anxiety, such actors have historically restricted civil liberties and access to courts.⁹ In this Article, I explore the notion of litigation as political expression, a notion that the Court previously developed to protect the advocacy of the NAACP and ACLU, and I ask whether and to what extent this doctrine can survive the current pressures of national security. I suggest that attorneys’ communications in support of litigation reflect fundamental First Amendment values tied to political expression, but implementing

¹ 18 U.S.C.A. § 2339A(b)(1) (West 2010); *id.* § 2339B(a)(1).

² *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

³ *Id.* at 2713, 2720, 2729.

⁴ *Id.* at 2730-31.

⁵ See *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 930 (9th Cir. 2009).

⁶ *Holder*, 130 S. Ct. at 2719.

⁷ *NAACP v. Button*, 371 U.S. 415, 428-31 (1963).

⁸ See *In re Primus*, 436 U.S. 412, 426-32 (1978).

⁹ See Tamar R. Birkhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1, 14-26 (2006) (describing evolution of political repression from World War I to War on Terrorism); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 4-15 (2003) (same).

protection for lawyers' communications presents a number of doctrinal challenges.

To explore this concept, I examine the Terrorist Surveillance Program ("TSP"), a warrantless wiretapping program that has not outlawed First Amendment activities but has significantly chilled them. Almost immediately after September 11, 2001, President George W. Bush launched a series of warrantless surveillance programs, which came to be known collectively as the TSP, and authorized the National Security Agency ("NSA") to engage in electronic monitoring of communications without judicial review.¹⁰ Widespread controversy erupted after the TSP became public in 2005, and, three years later, then-Senator Barack Obama campaigned as one of its critics.¹¹ Today, however, the Obama administration refuses to take a position on the constitutionality of the TSP, and, further, it argues that no court should be able to rule on this question.¹² Prior literature on the TSP and other post-9/11 wiretapping programs has focused primarily on individual rights protected by the Fourth,¹³ Fifth,¹⁴ and Sixth Amendments,¹⁵ but, as the Supreme Court has noted, "dread of

¹⁰ See President George W. Bush, President's Radio Address (Dec. 17, 2005) (transcript on file with New York Times), [hereinafter *Bush Radio Address*] available at http://www.nytimes.com/2005/12/17/politics/17text-bush.html?_r=1.

¹¹ See Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value, Officials Report*, N.Y. TIMES, July 10, 2009, at A1; Anne Broache, *Obama: No Warrantless Wiretaps If You Elect Me*, CNET NEWS, Jan. 8, 2008, http://news.cnet.com/8301-10784_3-9845595-7.html.

¹² Transcript of Proceedings at 5-7, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60 (2d Cir. 2009) (No. 08-4726) (transcript on file with author); Christine Kearney, *Obama Lawyer Says No Position on Bush-Era Wiretaps*, REUTERS, Oct. 9, 2009, available at <http://www.reuters.com/article/idUSTRE5985I720091009?feedType=RSS&feedName=politicsNews> (reporting on comments at oral argument).

¹³ See, e.g., Michael Avery, *The Constitutionality of Warrantless Electronic Surveillance of Suspected Foreign Threats to the National Security of the United States*, 62 U. MIAMI L. REV. 541, 587-99 (2008) (arguing TSP violates Fourth Amendment); Wilson R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA Is Constitutional and the President's Terrorist Surveillance Program Is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 564-75 (2007) (same); see also Teri Dobbins, *Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons*, 53 CATH. U. L. REV. 295, 329-46 (2004) (analyzing monitoring by Bureau of Prisons).

¹⁴ For a discussion exploring the Fifth Amendment right to due process and to counsel, see Kristen V. Cunningham & Jessica L. Srader, *The Post 9-11 War on Terrorism . . . What Does It Mean for the Attorney-Client Privilege?*, 4 WYO. L. REV. 311 (2004).

¹⁵ A number of critics focusing on the monitoring of attorney-client communications in federal prisons have argued that such monitoring interferes with the attorney-client privilege and violates criminal defendants' Sixth Amendment

subjection to an unchecked [government] surveillance power” can hamper both private and public expression and the exchange of ideas.¹⁶

This Article focuses on the First Amendment interests at stake in the TSP¹⁷ and, in particular, examines the First Amendment implications of wiretapping lawyers. Rather than utilize existing First Amendment theory to interpret the effects of the TSP, however, I turn the inquiry around. Drawing on a case study of twenty-three Guantánamo lawyers who believe they were targeted for surveillance, I use this example to explore the possibilities for a First Amendment theory of litigation as expression.

The Article proceeds as follows. Part I provides a brief review of the design of the American adversary system. Part II draws an analogy between the philosophical underpinnings of the adversary system and core philosophies underlying freedom of speech. Part III reviews Supreme Court doctrine protecting litigation as political expression and lawyers as those who make that expression effective. Part IV introduces the case study of Guantánamo lawyers threatened with warrantless surveillance. This part describes the surveillance, details

rights. See Birkhead, *supra* note 8, at 2-6; Avidan Y. Cover, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233, 1244-55 (2002); Chris Ford, *Fear of a Blackened Planet: Pressured by the War on Terror, Courts Ignore the Erosion of the Attorney-Client Privilege Effective Assistance of Counsel in 28 C.F.R. § 50.3(D) Cases*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 51, 53-54 (2006); see also Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 464-65 (2000). Terri Dobbins points to the need for an analysis beyond Sixth Amendment theory because large numbers of persons, such as material witnesses and persons arrested but not formally charged, are subject to monitoring but not entitled to Sixth Amendment rights. See Dobbins, *supra* note 13, at 338.

¹⁶ *United States v. U.S. District Court*, 407 U.S. 297, 314 (1972); see *id.* at 313 (“National security cases . . . often reflect a convergence of First and Fourth Amendment values.”); see also *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) (discussing potential chilling effects of electronic eavesdropping); *United States v. DiDomenico*, 78 F.3d 294, 299 (7th Cir. 1996) (Posner, J.) (distinguishing systematic, public monitoring from isolated incident and stating that totalitarian system of monitoring would necessarily interfere with freedom of communication).

¹⁷ See *ACLU v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006) (ruling that TSP violated First and Fourth Amendments, separation of powers, Administrative Procedures Act, and Foreign Intelligence Surveillance Act), *rev’d*, *ACLU v. Nat’l Sec. Agency*, 493 F.3d 644, 648 (6th Cir. 2007) (dismissing case for lack of standing); Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71, 78-79 (2009) (identifying privacy and First Amendment effects of TSP); see also Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133, 162 (2004).

its effects on the lawyers' communications, and identifies the impact on the litigation in which they have been engaged. Part V draws on the Guantánamo case study to further the theory of litigation as political expression. It highlights five factors, reflected in Supreme Court jurisprudence and the Guantánamo example, that help to define the category of litigation that ought to be recognized as political expression. Part V also considers additional questions about the scope of communications to be protected. The Article concludes with remarks regarding potential implications of recognizing First Amendment values in lawyers' work.

I. BACKDROP OF AMERICAN ADVERSARY SYSTEM

In the American court system, the development of the case is largely the responsibility of the parties. Lawyers are capable of and responsible for investigations as officers of the court.¹⁸ The judiciary generally does not conduct its own fact-finding but instead relies on the adversaries to exchange evidence and then bring relevant facts and legal arguments to the attention of the court.¹⁹ This distinguishes the American judiciary from other branches of the U.S. government²⁰ and from courts in other nations, which take an inquisitorial approach.²¹

Both American common law and federal rules of procedure and evidence have developed to aid the lawyer in performing her obligations as a zealous advocate.²² A catalogue of all such features of the adversary system is beyond the scope of this Article and unnecessary to develop a theory of litigation as First Amendment activity. As an entry point to the constitutional discussion, this section of the Article will focus on the protections for attorney communications.

The American legal system has historically provided varying degrees of protection for the privacy of lawyers' communications with clients,

¹⁸ See e.g., FED. R. CIV. P. 26-37 (defining rules of discovery process); FED. R. CIV. P. 45(a)(3) (granting attorneys power to issue and sign subpoenas as officers of court).

¹⁹ See, e.g., Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 207-10 (Fall 2001 – Spring 2002). Judges and clerks may conduct legal research beyond that which is included in parties' briefs, but courts generally rule on the arguments presented and do not issue advisory opinions.

²⁰ *Id.*

²¹ *Id.*

²² See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 36-38 (1978).

co-counsel, and others in the course of representation.²³ The oldest and strongest form of protection is the common law attorney-client privilege, which, since the sixteenth century, has prevented the government and other parties from compelling lawyers or clients to testify about their communications with one another.²⁴ Unless waived,²⁵ this privilege is generally understood to be an absolute and inviolate rule of evidence that extends beyond communications between the attorney and client, and includes the attorney's communications with other parties when they reflect communications between the attorney and client.²⁶

Underlying the attorney-client privilege is the belief that a promise of privacy encourages candor in communications, which enhances lawyers' representation of their clients.²⁷ The premise is that by encouraging the free flow of information, the privilege helps the advocate prepare fully and develop complete cognizance of the strengths and weaknesses in her client's case.²⁸ While David Luban

²³ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.") (citations omitted).

²⁴ See FED. R. EVID. 501. Professor Wigmore's well-known formulation of the attorney-client privilege is as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. 8 JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 2292, at 554 (John T. McNaughton ed., 1961).

²⁵ There are various ways a client can waive the privilege. Notably, many commentators interpret the crime-fraud exception, pursuant to which communications made to facilitate a crime or fraud are not covered by the privilege, as a waiver. The rationale is that, if one abuses the relationship, the relationship is no longer serving its intended purpose, and the privilege disappears. See, e.g., *Clark v. United States*, 289 U.S. 1, 15 (1933) ("[T]he privilege takes flight if the relation is abused.").

²⁶ See Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 1005 (1999).

²⁷ MCCORMICK ON EVIDENCE § 87, at 386-91 (John W. Strong ed., 6th ed. 2006).

²⁸ Some scholarship has suggested that the privilege protects intrinsic values of dignity and liberty, in addition to serving the instrumentalist goal of encouraging the exchange of information. The intrinsic value argument has particular appeal in the criminal context, where, absent the privilege, confiding in a lawyer could be tantamount to self-incrimination. See, e.g., Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-87 (1977) (asserting that combination of Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel create constitutional right to attorney-client

and Deborah Rhode have raised interesting questions about the empirical validity of the assumption that the privilege increases candor,²⁹ this assumption remains a foundational principle of the American adversary system.

In 1946, the Supreme Court added the work product doctrine,³⁰ which, in the modern discovery system, exempts material prepared in anticipation of litigation from compelled disclosure.³¹ In the discovery rules, Congress codified the Supreme Court's earlier insight:

It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . . That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.³²

In addition to aiding the acquiring of factual information, the work product doctrine creates a safe space for testing out ideas before presenting them to courts. The doctrine reflects a degree of respect for the lawyer's creative process; even its name conveys high regard for the fruits of the attorney's labor.³³ Such respect rests on the view that helping to protect and polish the lawyer's work improves the

privilege for criminal defendants). Yet this does not explain why the doctrine pervades civil litigation, nor why one's communications with one's attorney should receive stronger protections than those with one's doctor, clergy, or spouse. See Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 465 (2008).

²⁹ See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 242-44 (5th ed. 2009) (highlighting absence of empirical work demonstrating that privilege increases candor).

³⁰ See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

³¹ FED. R. CIV. P. 26(b)(3).

³² *Hickman*, 329 U.S. at 510-11.

³³ See *United States v. Nobles*, 422 U.S. 225, 238 (1975) (explaining that attorney work product doctrine plays a vital role "in assuring the proper functioning of the criminal justice system The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."); *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) ("[T]he purpose of the work-product immunity has been to avoid chilling attorneys in developing materials to aid them in giving legal advice and in preparing a case for trial. The fear of disclosure to adversaries of normal work-product would severely affect performance of the lawyer's role"); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967) (observing that attorney work product doctrine is "designed to encourage effective legal representation by removing counsel's fear that his thoughts and information will be invaded by his adversary if he records them").

adversary process. While the work product doctrine is not impermeable,³⁴ courts have attributed great significance to it, suggesting that compromising it even slightly could chill attorneys' thoughts, undermine attorneys' ability to perform their professional role, and potentially threaten the functioning of the adversary system.³⁵

As reflected in the Court's work product jurisprudence, the predominant rationale for the privacy shield is that preserving a zone of privacy improves the quality of the American justice system. One might reasonably ask why the advocate's work is accorded such high status. Criminal cases raise a special set of constitutional considerations, but even in civil litigation we seem to place a premium on the creation of conditions under which lawyers can do their best work. Particularly in the face of countervailing considerations, such as societal needs for information that would aid the search for truth or promote the public safety, why do we pride ourselves on blocking the release of information in the name of perfecting the lawyer's craft? Why do we maintain such reverence for the adversary system and those whose work supports it? The answer I propose is that the protections for the American adversary system reflect core First Amendment values.

II. FIRST AMENDMENT VALUES OF LITIGATION

For the purpose of simplicity, I divide justifications for protecting freedom of speech into three general categories: (1) individual autonomy; (2) pursuit of truth; and (3) promotion of democratic government. Below, I compare the primary values underlying the First Amendment with those promoted in the adversary system. Daniel Markovits has noted that the protection of individual rights and the pursuit of truth parallel First Amendment theories.³⁶ I suggest that the value of self-government is particularly important to the structure of the American court system.

³⁴ The doctrine "permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship," but "accords special protection to work product revealing the attorney's mental processes." *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981).

³⁵ See *United States v. Nobles*, 422 U.S. 225, 238 (1975); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

³⁶ See Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 *FORDHAM L. REV.* 1367, 1382 (2006) (suggesting justifications of adversary advocacy parallel those of democracy).

A. Individual Autonomy

Some theorists describe free speech as an intrinsically valuable aspect of individual liberty.³⁷ Under this view, freedom of expression embodies not merely a positive enactment to advance some conception of the good, but a pre-political entitlement based in personal autonomy and free development of one's faculties.³⁸ Speech has a core value based in individual self-realization³⁹ and control over one's own reasoning process.⁴⁰ While the autonomy value is most often associated with the right of the speaker to express herself, it also protects the listener, whose access to information assists her in making personal decisions.⁴¹

Just as many interpret free speech as a fundamental liberty interest, the most basic defense of the American court system is that this structure is uniquely protective of the rights, dignity, and autonomy of the individual.⁴² The role of defense counsel is to serve as the client's "zealous advocate against the government itself," and counsel's obligations of investigation and disclosure are defined almost entirely in service of that role.⁴³ Some scholars interpret the maintenance of the adversary system as inherently valuable.⁴⁴ They explain that the structure of the system "keep[s] sound and wholesome the procedure by which society visits its condemnation on an erring member."⁴⁵ Criminal defense attorneys and scholars emphasize the inherent value of working to "police the police, audit the government, [and] . . . fight for fairness."⁴⁶

³⁷ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47-69 (1989).

³⁸ See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

³⁹ *Id.*

⁴⁰ See David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62-63 (1974); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991).

⁴¹ See Redish, *supra* note 38, at 593-94.

⁴² MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 2 (1975).

⁴³ MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 20-21 (2002).

⁴⁴ Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 AM. B. ASS'N J. 1159, 1160-61 (1958).

⁴⁵ Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30, 35 (H. Berman ed., 1960).

⁴⁶ Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 957 & n.158 (2000) (citations omitted).

Critiques of the individualist free speech philosophy align with critiques of individualist justifications for the adversary system. Some First Amendment theorists point out that self-fulfillment may derive from activities other than speech, and speech should not be assumed to have a uniquely fundamental relationship to self-actualization.⁴⁷ One might make a similar comment on the individualist approach to our legal system: it rationalizes the system as respectful of the individual's autonomy but assumes the client's autonomy as a person is inextricable from that of her legal case. Perhaps the more one accepts the notion that verbal expression is fundamental to the development and exercise of rational capacities, the more one will be inclined to interpret both freedom of speech and the adversary system as reflecting intrinsic values of human dignity.⁴⁸ Moreover, while the structure of the system may protect criminal defendants' due process rights,⁴⁹ the process of civil litigation does not necessarily include comparable safeguards. On the contrary, without access to lawyers with time for adequate representation, many indigent litigants, both civil and criminal, find their experience in the adversary process quite disrespectful of their basic dignity.⁵⁰

B. *Pursuit of Truth*

The well-known philosophy of the "marketplace of ideas" suggests that "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁵¹ John Stuart Mill and others have argued that robust dialogue promotes the pursuit of truth.⁵² Individual expression is protected so that messages may enter the stream of discussion, and people may make better, more informed choices. Ultimately the dissemination of more ideas is expected to lead to true or socially good ones. Under this approach, the value of free

⁴⁷ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971).

⁴⁸ See also Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 611-12 (1985) [hereinafter *Ethical Perspectives*]; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1-14 (1975), reprinted in RHODE AND LUBAN, *supra* note 29, at 138.

⁴⁹ Smith, *supra* note 46, at 957 & n.158 (citations omitted).

⁵⁰ See Rhode, *Ethical Perspectives*, *supra* note 48, at 611-12 (suggesting partisanship loses social value on individualist grounds when partisans are allocated by market forces).

⁵¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁵² See JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rappaport ed., Hackett Publishing Co. 1998) (1859).

speech is purely instrumentalist: the right of the speaker to express herself receives even less emphasis than that of the listener to hear the message communicated. Notably, the truth-seeking philosophy leaves room to permit government restrictions of false, coercive, or abusive speech, which does not aid the truth-seeking function.

The second classic argument for supporting the adversary system and lawyers' work within it is that they promote the public search for truth. As discussed earlier, American courts rely on parties to investigate and present their own cases to an impartial tribunal. Many believe that this is the best process to ferret out an accurate picture of events.⁵³ This approach reflects the assumption that a clash of parties' self-interests will lead to a better result than would be reached if a single government actor maintained the responsibility and power to conduct investigations.⁵⁴

In this way, the adversarial model mimics the philosophy of the marketplace of ideas.⁵⁵ Comparable to the free speech philosophy that rests on the assumption that the dissemination of more ideas will lead to true or socially good ones, the adversary system is premised on the notion that litigation will lead to truth and substantive (as well as procedural) justice. The courtroom is understood as a place for divergent ideas and evidence to be tested so truth may emerge.⁵⁶ The role of the advocate in this system is to present facts and arguments that challenge the other side and direct the court's focus. Just as citizens' expression is protected so messages may work their way into the stream of discussion and society can make informed choices, the

⁵³ See *United States v. Nobles*, 422 U.S. 225, 230 (1975); Monroe H. Freedman, *Professional Responsibilities of the Civil Practitioner*, in *EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER* 151, 152 (D. Weckstein ed., 1970); Fuller, *supra* note 45; E. Allen Lind, John Thibaut & Laurens Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1143-44 (1973). Some point out that numerous rules of procedure, based on both statutes and the U.S. Constitution, block truth from reaching the forum. While rules based on individual rights and notions of fairness do regularly trump the need for truth, their presence does not necessarily disprove the role of truth as a motivating factor for the design of the system. As just one example, the privilege against self-incrimination may function to exclude a confession from court, but perhaps the underlying rationale, beyond a notion of due process, dignity, or burdens, is a concern about coerced confessions by innocent parties.

⁵⁴ See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 69-77 (1988) (suggesting that international comparison reveals flaws in American system); W. Bradley Wendel, *Lawyers as Quasi-Public Actors*, 45 ALBERTA L. REV. 83 (2008) (comparing common law with civil law systems).

⁵⁵ See, e.g., MILL, *supra* note 52.

⁵⁶ See Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Access*, 51 AM. U. L. REV. 835, 865-68 (2002).

lawyer's ability to acquire and safeguard information and ideas is protected so that the decision-maker benefits from fully developed presentations of facts and theories by at least two different perspectives.

The main flaw in the marketplace outlook can also be identified in the adversary system.⁵⁷ A laissez-faire approach to freedom of speech disproportionately represents the views of those with economic and political power.⁵⁸ Similarly, the inequality of access to courts, lawyers, and resources supporting those lawyers can make faith in the system's ability to create substantive justice appear naive or disingenuous.⁵⁹ Additionally, many of the rules of evidence and procedure protect strategy and gamesmanship more than full revelation of true facts. Just as the actors in the free market of ideas may lack full information or make choices for irrational reasons, so too may the fact-finder in American courts. Even assuming the accuracy of the adversary system as a truth-seeking model, one might point out that the actual administration of the American system is riddled with flaws that interfere with its capacity as a truth producer.

C. *Promotion of Self-Government*

While the design of the adversary system does reflect the values of respect for individual autonomy and promotion of the search for truth, the system also rests on a third rationale — one which has been advanced in defense of freedom of speech but not fully explored as a basis for the American legal system. This third value is democratic self-governance. This interpretation emphasizes the place of the First Amendment in the body of the Constitution as a whole. It highlights the self-governing role that the Constitution grants to "We the People." As First Amendment scholars have noted, political speech may have particular value because, like a town meeting, it facilitates public participation in, shaping of, and restrictions on government. The self-governing value has two related strands: (1) improving the quality of governance by the people, and (2) facilitating the process of citizen participation regardless of substantive outcomes.

⁵⁷ See Markovits, *supra* note 36, at 1391.

⁵⁸ See, e.g. OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 31-46 (1996); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984).

⁵⁹ David Udell & Rebekah Diller, *Access to Justice: Opening the Courthouse Door* BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF LAW (2007), available at http://brennan.3cdn.net/297f4fabb202470c67_3vm6i6ar9.pdf.

The first strand resembles the marketplace of ideas,⁶⁰ in that it aims to provide a means for better ideas to rise to the top, but it privileges ideas related to the political sphere. To inform voting and other acts of civic participation, democratic citizens need a right to exercise their voices and to hear the voices of others. Because political speech improves self-government, such speech receives the highest level of First Amendment protection.

This approach receives particular support from theorists like Vincent Blasi, for whom the principal purpose of the First Amendment is to facilitate a check on governmental abuses of power.⁶¹ If the essential function of the First Amendment is to give people the tools to restrict the government's power, facilitating criticisms of government action becomes paramount. For Blasi, rights to acquire information therefore deserve recognition.⁶² Citizens with specialized abilities to understand, disseminate, or respond to information take on a special role in this constitutional scheme.⁶³

The second strand of thought on self-government takes a far less elitist stance. It emphasizes the First Amendment value of facilitating citizen participation. This perspective resembles the autonomy framework, in that it incorporates an individual right of expression, yet the goal is the process of deliberation by the people. Under this view, all citizens have an equal right to participate in and influence public discourse. The polity benefits from the diversity of views, not simply because the diversity generates the best ideas, but because the communicative process is itself essential to a healthy democracy.

⁶⁰ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (highlighting "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* at x-xiii (1948).

⁶¹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) [hereinafter *Checking Value*]; see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985) ("[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times."); see Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2-5 (1989).

⁶² Blasi, *Checking Value*, *supra* note 61, at 610 ("[T]he key stage of the checking process is the initial acquisition of information.").

⁶³ See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253 (1961); see also Blasi, *Checking Value*, *supra* note 61, at 541-42, 547-48; Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2368 (2000).

Applying this framework, the design of the adversary system reflects the value of democratic governance.⁶⁴ The court system increases public participation in civic discourse and improves self-governance.⁶⁵ As Robert Tsai emphasized in his insightful piece, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*,⁶⁶ the adversary system encourages expression of ideas from parties representing at least two different views and, thus, promotes a diversity of perspectives. Moreover, the court provides a forum for presenting those ideas directly to judges, who embody a branch of government.⁶⁷ The adjudicative process allows a back-and-forth exchange between the parties and the court.⁶⁸ The judiciary must respond to complaints from the public; when a judge faces a live controversy, she must resolve it one way or the other. When the judge issues a decision, she creates case law, and, whether the proceeding is large or small, any litigation that results in a published opinion involves the public in shaping the law. Certainly, the majority of decisions do not result in published opinions, but, even in those cases, the public has set in motion a decision that carries the force of law and orders social relations, even if only between the parties and only to preserve the status quo.⁶⁹

Tsai interprets constitutional litigation as a form of politically dissident speech.⁷⁰ He highlights the significance of allowing an individual member of the public to file a formal complaint criticizing government action.⁷¹ Indeed, in accordance with Blasi's emphasis on the checking value of First Amendment activity,⁷² litigants do set in

⁶⁴ One might also suggest that, like the expression of dissent, adjudication offers a peaceful method of solving social problems. See Markovits, *supra* note 36, at 1386.

⁶⁵ See Tsai, *supra* note 56, at 840-51 (describing how court process reflects free speech values); Judith Resnick, *Courts and Democracy: The Production and Reproduction of Constitutional Conflict* 8 (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 164, 2008), available at papers.ssrn.com/sd3/papers.cfm?abstract_id=1148202 (describing courts as democratic institutions required to hear different views and provide "venues for debating and developing norms"); see also SEYLA BENHABIB, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 67, 79-80 (Princeton Univ. Press 1996); Fuller, *supra* note 45, at 35.

⁶⁶ Tsai, *supra* note 56.

⁶⁷ *Id.*

⁶⁸ See Fuller, *supra* note 45.

⁶⁹ Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 388 & nn.157-58 (2010).

⁷⁰ Tsai, *supra* note 56, *passim*.

⁷¹ *Id.* at 871.

⁷² See Blasi, *Checking Value*, *supra* note 61, at 527.

motion the process by which the judiciary checks excesses by other government actors.⁷³ At the same time, although Tsai describes the court as an almost radical institution that permits ordinary people to speak truth directly to power,⁷⁴ parties in constitutional litigation rarely speak directly to judges — they usually speak through their attorneys.

This raises a question about the role of lawyers' speech in the adversary system.⁷⁵ If the adversary system provides a forum for expression that serves the same values as those underlying the First Amendment, it becomes useful to consider the degree of protection that should be recognized for the lawyer's speech in support of her adversary role. Further, if the adversary system provides special opportunities for self-government and democratic participation, perhaps speech in support of litigation ought to receive heightened protection as political expression. In the next part, I consider Supreme Court doctrine that initiates this inquiry.

III. THE SUPREME COURT'S APPROACH TO LAWYERS' SPEECH IN SUPPORT OF LITIGATION

Proposing to extend First Amendment protection to speech in support of litigation relies on the premise that the litigation itself is a form of in-court speech that can reasonably be accorded full First Amendment protection. An objection could be made that any freedom of expression in the courtroom could not be absolute. Procedural and evidentiary rules, as well as judicial discretion, will impose limits on time, subject matter, whether to have argument or briefing on certain issues, or whether certain cases will be heard at all. Christopher Peters suggests that restrictions on what he terms "adjudicative speech" are necessary to preserve the opportunity for all litigants to participate fully and fairly in the decision-making process.⁷⁶

Yet these rules may fairly be developed like time, place, and manner restrictions necessary for safety and order. The acceptance of restrictions on some speech to maintain an environment for diverse viewpoints may be analogized to curtailing hate speech to increase public dialogue including minority voices. Similarly, proponents of the

⁷³ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001).

⁷⁴ Tsai, *supra* note 56, at 871.

⁷⁵ Tsai mentions that, under his theory of court access as political speech, lawyers maintain an independent expressive interest, but he does not elaborate on this suggestion. *Id.* at 889.

⁷⁶ Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 791 (2004).

marketplace of ideas viewpoint might staunchly protect speech that aids the flow of information while still limiting false or coercive statements, which do not aid decision-making. The existence of some limits on courtroom speech does not necessarily indicate that courts are a site where interests in expression are diminished; the limits could reflect the contrary.⁷⁷

Scholars and members of the Supreme Court have debated whether lawyers' speech should receive lower protection than that of ordinary citizens', because of its commercial element,⁷⁸ or instead heightened protection because of lawyers' important role in the adversary system.⁷⁹ One seminal case addressed whether states may more sharply limit lawyers' speech for the purpose of protecting the adversary system.⁸⁰ In *Gentile v. State Bar of Nevada*,⁸¹ the Supreme Court of Nevada disciplined a lawyer for making a statement to the press regarding an ongoing case. Although the State of Nevada alleged no "clear and present danger" of actual prejudice, it claimed the lawyer "knew or should have known" his statement had a "substantial likelihood" of materially prejudicing the trial of his client. The U.S. Supreme Court had previously mandated the "clear and present

⁷⁷ See Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 335 (2008) (highlighting uniqueness of litigation as form of speech for forum analysis); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 477-78 (2004) (highlighting tradition of courts as forums for expressing controversial viewpoints and communicating with larger public).

⁷⁸ See *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563-65 (1980) (identifying intermediate scrutiny test for commercial speech); see, e.g., *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 622-24 (1995) (interpreting attorney advertisements as commercial speech subject to intermediate scrutiny pursuant to *Central Hudson*); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (holding that disclosure requirements for attorney advertisements require only reasonable connection to state's interest in protecting consumers from deception).

⁷⁹ See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 306 (2001) (highlighting competing interests). For an excellent summary of the contradiction in the law regarding the level of protection for attorney speech, see Kathleen Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569-70 (1998). Sullivan suggests, though she does not develop the idea, that lawyer speech might have special authority because of the special knowledge or insight provided by the training. *Id.*; see also Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 872-74 (1998) (arguing that lower scrutiny of restrictions on lawyer speech is unconstitutional condition on bar membership, and lawyer's speech is protected by First Amendment because it advances societal interests).

⁸⁰ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1031-32 (1991).

⁸¹ *Id.* at 1062-76.

danger" standard for regulation of the press during pending proceedings, but in *Gentile* it distinguished restrictions on lawyers' statements to the press as deserving a lower standard of scrutiny. Chief Justice Rehnquist explained: "Membership in the bar is a privilege burdened with conditions."⁸² Although the Court ultimately ruled that the statute in *Gentile* was unconstitutionally vague, some might assert that, following *Gentile*, lawyers' speech receives a lower level of protection than that of ordinary citizens.

A more nuanced interpretation of *Gentile* can be drawn from Peters's theory of adjudicative speech. It is not that lawyers categorically sacrifice their constitutional protections, but rather that the Court prioritizes adjudicative speech over other forms. When speech outside the courtroom can interfere with speech within, the Court gives precedence to protecting the exchange of ideas within the judicial system.⁸³ In this sense, the lawyer engaged in litigation might receive full First Amendment protection necessary to further litigation, but if her communication could compromise that litigation, it might take a backseat to adjudicative priorities. One might disagree with the Court's assessment that the attorney's comments to the press in *Gentile* threatened to harm the ongoing proceeding; given that the attorney was responding to earlier publicity that could have prejudiced his client's trial, one might interpret the facts in the opposite light.⁸⁴ Either way, the underlying principle is the same: courts will protect and allow other government actors to protect adjudicative speech.

The Court's ambivalence about the regulation of lawyers' speech is more pronounced in its split decisions on attorney advertising.⁸⁵ The Court has struggled to draw lines between in-person solicitation and mailed advertisements,⁸⁶ and solicitation for remunerative legal

⁸² *Id.* at 1066 (quoting *In re Rouss*, 115 N.E. 782, 783 (N.Y. 1917)).

⁸³ *See id.* at 1070-76 (internal punctuation and citations omitted) (emphasizing importance of "preventing prejudice to an adjudicative proceeding," and noting that, "although litigants do not surrender their First Amendment rights at the courthouse door, those interests may be subordinated to other interests that arise in this setting").

⁸⁴ *Id.* at 1039-43.

⁸⁵ *See, e.g.*, *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 635 (1995) (holding that restriction on targeted mail advertisements withstood scrutiny); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479-80 (1988) (striking down restriction on targeted mailings); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 655-56 (1985) (reversing discipline against attorney for truthful and not misleading statements in advertising, but upholding discipline for failure to include sufficient information about costs); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (reversing advertising sanction against attorney).

⁸⁶ *See, e.g.*, *Shapero*, 486 U.S. at 474-75 (suggesting mode of communication is critical factor).

services as opposed to pro bono activity.⁸⁷ Yet the Court has consistently protected solicitation for litigation that the Court recognized as “political.” In those cases, the Court interpreted the communications of lawyers and their agents in the course of solicitation as entitled to the highest First Amendment protection.

A. *Doctrine on Litigation as Political Expression*

The Supreme Court has taken steps towards recognizing speech in support of litigation as a form of expression entitled to First Amendment protection, but the grounding and contours of it remain ambiguous. The Court’s first move in this direction was *NAACP v. Alabama*,⁸⁸ in which it ruled that a state court order requiring the NAACP to disclose the names and addresses of all of its members and agents⁸⁹ unconstitutionally infringed the NAACP’s “freedom to engage in association for the advancement of beliefs and ideas.”⁹⁰ The Court held that mandated disclosure of identifying information would chill members’ exercise of their liberty interest in freedom of association. The opinion highlighted the close nexus between the freedoms of association, assembly, and speech, and emphasized the free speech implications of the state court’s order. Introducing the concept of a “right to advocate,”⁹¹ the Court stated that association is often necessary to realize “effective advocacy,” especially of dissident viewpoints.⁹²

Five years later, the Court focused on the role of litigation as a form of expression, especially on behalf of minorities.⁹³ The Virginia legislature had expanded that state’s definition of solicitation so that

⁸⁷ Compare *In re Primus*, 436 U.S. 412, 439 (1978) (protecting solicitation as political speech), with *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 468 (1978) (ruling speech was unprotected).

⁸⁸ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452 (1958).

⁸⁹ Lawyers and litigation were not central to the *Patterson* decision, though they were included among the agents and activities at issue. The Attorney General of Alabama had brought an equity suit against the NAACP, alleging that the organization had opened a local office, recruited members, solicited donations, provided legal and financial assistance to “Negro” students, and supported a bus boycott in Montgomery, all while failing to comply with the qualification procedures required before any foreign entity may conduct business in the State. *Id.* at 452. It was in the course of this equity suit that the government sought access to the names and addresses of the NAACP members and agents. *Id.* at 453.

⁹⁰ *Id.* at 460.

⁹¹ *Id.* at 461.

⁹² *Id.* at 460.

⁹³ *NAACP v. Button*, 371 U.S. 415, 431 (1963).

the NAACP's method of outreach to potential clients now constituted unlawful activity; the NAACP sought to enjoin the enforcement of the new law.⁹⁴ In *NAACP v. Button*, the Supreme Court ruled that the NAACP's "litigation [wa]s not a technique of resolving private differences" but a "means for achieving equality of treatment by all government . . . for members of the Negro community in this country."⁹⁵ The Court held that the litigation was entitled to constitutional protection as a form of "political expression" on which the new Virginia law infringed.⁹⁶

The majority of the opinion was devoted to emphasizing the importance of litigation not only as a means of vindicating the rights of African-Americans, but also as a process for amplifying the voices of minority, dissident members of society. According to the Court, it was even "more important" than the vindication of individual rights that litigation "makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society."⁹⁷ This language reflects a view of litigation as a vehicle for the dissemination of political expression, prioritizing the circulation of a diversity of perspectives.

Notably, the Court was particularly troubled by the quieting of the litigation because it suspected that alternative channels of communication were inadequate. Arguably, the NAACP had other means of communicating its political views, but the Court insisted that, for "minority, dissident groups . . . association for litigation may be the most effective form of political association"⁹⁸ and the "sole practicable avenue . . . to petition for redress of grievances."⁹⁹ This language fails to parse distinctions between rights of expression and petition,¹⁰⁰ but nonetheless embraces a public law conception of litigation as an essential means of disseminating a message to government actors and to larger society.

The high water mark of protection for lawyers' speech in support of litigation with a political purpose was *In re Primus*.¹⁰¹ This case identified First Amendment protection for a lawyer separate and apart

⁹⁴ *Id.* at 417-18.

⁹⁵ *Id.* at 429.

⁹⁶ *Id.*

⁹⁷ *Id.* at 431.

⁹⁸ *Id.*

⁹⁹ *Id.* at 430.

¹⁰⁰ Compare Tsai, *supra* note 56, at 840-51 (interpreting court access as free speech right), with Garcia, *supra* note 77, at 336 (interpreting court access as a petition right), and Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 728-31 (2003) (same).

¹⁰¹ *In re Primus*, 436 U.S. 412 (1978).

from any right held by a client. Edna Smith Primus was an attorney practicing in South Carolina who participated in ACLU litigation on a pro bono basis.¹⁰² Upon invitation, she spoke to a group of low-income women who had been sterilized as a condition of continued receipt of Medicaid assistance. Primus informed her audience of their legal rights and the possibility of initiating litigation.¹⁰³ She later followed up with one of the women, extending a written offer of free legal representation by the ACLU. The State of South Carolina sanctioned Primus for solicitation.¹⁰⁴

The Supreme Court held that the punishment violated the lawyer's First Amendment rights of political expression and association. Explaining that Primus's solicitation was intended to "advance . . . beliefs and ideas"¹⁰⁵ on behalf of "unpopular" causes or clients,¹⁰⁶ the *Primus* Court extended the notion of protected litigation as described in *Button* to include lawyers who may not themselves be a member of a minority but act upon ideological commitment to representing unpopular viewpoints or clients.¹⁰⁷ Reflecting growing familiarity with concepts of "[p]ublic [i]nterest [l]aw"¹⁰⁸ and "associational aspect[s] of expression,"¹⁰⁹ *Primus* embraced the notion of litigation as a mode of political expression and, more specifically, as a particularly valuable means of voicing political dissent.¹¹⁰

¹⁰² *Id.* at 414.

¹⁰³ *Id.* at 415-16.

¹⁰⁴ *Id.* at 417-18.

¹⁰⁵ *Id.* at 424.

¹⁰⁶ *Id.* at 427-28.

¹⁰⁷ One aspect of *Button* that appears to have received scant attention is the Court's mention that all NAACP attorneys at the time were themselves African-American. Though it seems doubtful that the Court would have decided the case differently otherwise, it implies that perhaps attorneys' right to litigate is limited to those circumstances in which the lawyers' activities may be viewed as petitioning for redress of their own grievances. After *Primus*, however, it becomes clear that the public interest lawyer who cannot claim to experience her clients' plight as her own still enjoys First Amendment protection for her litigation activities.

¹⁰⁸ *In re Primus*, 436 U.S. at 438 & n.32 (citing Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 210-14 (1976)).

¹⁰⁹ *Id.* (citing Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 26 (1964) (highlighting role of association in amplifying messages to reach broader audiences)).

¹¹⁰ Leading up to *Primus*, the Court extended First Amendment protection even to litigation that the Court did not explicitly recognize as political, on the theory that litigation by union members was protected as part of their right of association. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585-86 (1971); *United Mineworkers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 225 (1967); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964). In *Brotherhood of Railroad Trainmen*, the

B. *The Expressive Role of the Lawyer*

In 2001, Justice Kennedy authored *Legal Services Corp. v. Velazquez*, an unusual decision elaborating on the unique role of litigation as a means of expression and describing lawyers as actors who make effective expression possible.¹¹¹ Unlike the cases before it, *Velazquez* did not discuss the unique contributions of expression on behalf of minorities. In fact, though there was a brief reference to the role of litigation in social change,¹¹² the decision neither cited the litigation-as-political-expression precedent nor explicitly identified the speech in *Velazquez* as political.

The case addressed whether certain congressional conditions imposed on the use of Legal Services Corporation ("LSC") funds, appropriated by Congress, violated the "rights of LSC grantees and their clients."¹¹³ The key condition prohibited LSC-funded lawyers, authorized to represent individual welfare claimants, from raising arguments challenging then-existing welfare laws.¹¹⁴ Although the Court invalidated the regulation on First Amendment grounds,¹¹⁵ much of the Court's reasoning was based on the role of lawyers in protecting the balance of powers. Explaining that the judiciary relies on advocates to "present all the reasonable and well-grounded arguments necessary for proper resolution of [a] case,"¹¹⁶ the Court ruled that "[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys."¹¹⁷

Velazquez endorses the notion of expressive interests particular to

Court reasoned that the right to litigate was essential to preserving those rights guaranteed by the federal statutes on which the litigation was based. 377 U.S. at 5-6. In *United Mineworkers*, which concerned workers' compensation claims, the Court expressly denied that *Button* was limited to political litigation. 389 U.S. at 223. Yet it was in *Primus*, where the litigation was political, that the Court ruled that the government conduct at issue was subject to "the 'exacting scrutiny applicable to limitations on core First Amendment rights.'" 436 U.S. at 432 (citing *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)). This stands in direct contrast to the Court's ruling in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978), where attorney solicitation without a political purpose received a much lower level of protection. *Primus* and *Ohralik* were issued the same day, and the juxtaposition suggests that the Court recognizes the need for higher protection where the litigation is political.

¹¹¹ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

¹¹² *Id.* at 548.

¹¹³ *Id.* at 536.

¹¹⁴ *Id.* at 536-37.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 545.

¹¹⁷ *Id.* at 544.

lawyers' communications in support of litigation. In contrast, *Alabama* did not highlight lawyers in particular. Both *Button* and *Primus* held simply that the regulation of lawyers' speech, even if tied to the regulation of the profession, was subject to constitutional review like any other government regulation of expression. The *Velazquez* Court goes further and rests its holding on the significance of the lawyer's role in a participatory democracy. While the *Velazquez* Court never fully embraced the label of viewpoint discrimination, which the Second Circuit had ascribed to the LSC restrictions,¹¹⁸ the Court found that the regulations, designed to shield government views from the test of constitutional litigation, impeded a diverse and vibrant dialogue meant to occur in court. "[T]he ordinary course of litigation involves the expression of theories and postulates on both, or multiple, sides of an issue," the Court explained. This choice of language emphasizes a view of the adversary system as one that functions to aid a deliberative democracy. Justice Kennedy never describes the protected expression as political, and he makes no mention of cases like *Alabama*, *Button*, and *Primus*. He does, however, recognize the political implications of limiting lawyers' advocacy, stating, "It is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹¹⁹

Remarkably, the *Velazquez* Court found that "no alternative channel" existed for the expression of the message barred by the LSC regulations.¹²⁰ This is telling, given that the restriction at issue affected only litigation, not other forms of advocacy or speech.¹²¹ Even with respect to litigation, the limit applied only to the expression of a subset of attorneys. The clients were free to communicate to the judiciary any messages they wished, as long as they did so pro se or through non-LSC counsel.¹²² The Court mentioned the unlikelihood of indigent clients locating alternative counsel, but both the language

¹¹⁸ *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 769-70 (2d Cir. 1999).

¹¹⁹ *Velazquez*, 531 U.S. at 548 (internal punctuation and quotation omitted).

¹²⁰ *Id.* at 546-47.

¹²¹ The Court does not even mention the possibility of nonlitigation forms of expression or means of redress like petitioning the legislature directly. I do not mean to overstate the importance of this omission, given that the issue was not before the Court, and the LSC lawyers are expressly prohibited from lobbying for welfare reform, but perhaps it implies that, on some level, the Court appreciates that litigation is, if not the most effective means of political expression for the most vulnerable members of society as *Button* highlighted years before, still an essential one. See *NAACP v. Button*, 371 U.S. 415, 431 (1963).

¹²² See *Velazquez*, 531 U.S. at 546-47.

and the logic of the decision suggest a primary concern with the unlikelihood of the prohibited message finding expression in an alternative speaker.

Velazquez does not appear to be based on the First Amendment rights of legal services clients. Unlike criminal defendants, welfare recipients have not been recognized as possessing a right to a lawyer.¹²³ Perhaps the case could have been decided on the welfare recipients' due process rights, but the Court made no such mention. Denial of counsel to a civil litigant has generally not been considered equivalent to a denial of court access.¹²⁴

The decision is best interpreted as resting on the role of lawyers expressing messages to courts.¹²⁵ Comparing the outcome of *Velazquez* to that of *Rust v. Sullivan*,¹²⁶ decided a decade earlier, adds further support to this interpretation. In *Rust*, the Court ruled that a restriction prohibiting doctors at federally funded clinics from discussing abortion with patients was constitutionally valid, despite the fact that, as Justice Scalia points out in his *Velazquez* dissent, the clinic patients were "effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services."¹²⁷ In *Rust*, the Court explained, "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency."¹²⁸ That the Court interprets the restrictions in *Velazquez* so differently suggests it is focused on the role of attorneys, whose expression the Court views as vital to a functioning democracy.

The Court distinguishes *Rust* on grounds that imply lawyers' expressive rights may be more robust than those of other

¹²³ Compare *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (establishing right to appointed counsel for criminal defendants), with *Velazquez*, 531 U.S. at 557 (Scalia, J., dissenting) (highlighting that neither party alleged welfare claimants enjoyed right to appointed counsel).

¹²⁴ The closest the Court ever came to recognizing a right to a lawyer as an aspect of the right to court access may have been *Bounds v. Smith*, 430 U.S. 817, 828 (1977), in which the Court ruled that, to avoid obstructing the right to petition for habeas corpus, a prison was constitutionally obligated to provide either law libraries or assistance from persons trained in the law.

¹²⁵ See also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281-82 (1985) (ruling that opportunity to practice law is fundamental right for purposes of Privileges and Immunities Clause).

¹²⁶ *Rust v. Sullivan*, 500 U.S. 173, 191-201 (1991).

¹²⁷ *Velazquez*, 531 U.S. at 557-59 (Scalia, J., dissenting) (quoting *Rust*, 500 U.S. at 203).

¹²⁸ *Id.*

professionals. Without overtly embracing the notion of lawyers as higher in the constitutional order than other professionals, the Court rules that, while government-funded doctors function as speakers for the government and can be expected to disseminate the government's message, government-funded lawyers, in contrast, are charged with expressing a "diversity" of perspectives.¹²⁹ This logic suggests that there exists some "nomos"¹³⁰ of a lawyer that goes beyond positive law and is essentially connected to the advocacy of diverse messages. The Court highlights that in a welfare case, the government has its own lawyer to deliver its message, while the LSC attorney serves a different master. The LSC attorney cannot present the government's views, because she functions to present those of her own client.¹³¹ The Court places special emphasis on how Congressional attempts to impose messages on the LSC lawyers distorts their fundamental role as neutral partisans.

To the extent that *Velazquez* implies that lawyers' expressive rights are more important in a deliberative democracy than the expressive rights of others, the Court's true motivation appears to be that infringements on lawyers' activities not only interfere with the exchange of ideas generally, but also threaten to disrupt the balance of powers. Drawing on the language of *Marbury v. Madison* concerning the "mission of the judiciary,"¹³² the opinion states repeatedly that truncating the lawyers' analysis and presentation of issues deprives the judiciary of the "informed, independent bar" upon whose "speech and expression" "courts must depend for the proper exercise of the judicial power."¹³³ By undercutting the lawyers, the Court says, Congress undercuts the judicial branch. Interpreting the LSC intrusions on lawyers' work as depriving the courts of their constitutionally

¹²⁹ *Velazquez*, 531 U.S. at 542. Justice Scalia accuses the majority of demonstrating "improper special solicitude for our own profession." *Id.* at 562 (Scalia, J., dissenting); see Barton, *supra* note 28, at 455 n.4. For a snapshot of the Court's views on journalists' protection, see *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978) (noting skepticism about chilling effects and risks to journalist's sources as result of search of newsroom); *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972) ("[W]e remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify . . ."); see also Blasi, *Checking Value*, *supra* note 61, at 591-611.

¹³⁰ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 5-11 (1983).

¹³¹ *Velazquez*, 531 U.S. at 542 ("The lawyer is not the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client.").

¹³² *Id.* at 545 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹³³ *Id.* at 545 (citation omitted).

mandated authority, *Velazquez* aligns the healthy functioning of the advocate with proper checks on governmental authority.¹³⁴

While the cases discussed above suggest that lawyers' communications in the course of litigation deserve First Amendment protection, they leave certain questions unanswered. Although a First Amendment decision, *Velazquez* did not overtly recognize the political expression elements of the litigation at issue. Justice Kennedy did not set his opinion against the background of *Button* and *Primus*. For their part, the earlier cases involving the NAACP and ACLU, while more explicitly grounded in a right to advocate, existed in a particular historical context, roughly half a century ago, in which the Court may have believed that the governmental interest on the other side was little more than a fig leaf for intentionally thwarting the activities of civil rights groups. Those rulings, therefore, may not provide the best indicator of how the Court would rule if faced with a real governmental interest. In the next part, I consider a present-day example in which the government's interest is quite real.

IV. CASE STUDY IN GOVERNMENT INTERFERENCE IN LITIGATION

To further the inquiry concerning the level of protection that ought to be accorded attorneys' communications in support of litigation, this part examines a case study of attorneys representing Guantánamo detainees under the shadow of warrantless wiretapping. The example of the Guantánamo lawyers' advocacy and the government interference with it illustrates the First Amendment values promoted by litigation and threatened by government intrusions. I begin by providing some background on the surveillance and the ways in which the surveillance impeded the lawyers' fact-gathering and formulating of theories. I then turn to the First Amendment values at stake. Finally, I utilize the case study to highlight challenges for formulating a theory of litigation as expression.

A. Surveillance of Lawyers

On December 17, 2005, President George W. Bush announced that, in the aftermath of September 11, 2001, he had authorized the National Security Agency ("NSA") to engage in a warrantless surveillance program "to intercept the international communications of people with known links to Al Qaeda and related terrorist

¹³⁴ *Id.*

organizations.”¹³⁵ The once-secret program became commonly known as the Terrorist Surveillance Program (“TSP”). As of 2005, President Bush had reauthorized the program more than thirty times.¹³⁶

The TSP authorized the NSA to gather foreign intelligence by monitoring communications whenever one party was outside the United States and the government had “reason to believe that at least one party to the communication” had a “link” to or was “affiliated” or “associated” with al Qaeda or “related terrorist organizations,”¹³⁷ was a member of an organization that the government considered “affiliated” with al Qaeda,¹³⁸ or worked “in support of al Qaeda.”¹³⁹ The Department of Justice (“DOJ”) confirmed the details of the surveillance program in a forty-two page White Paper, issued on January 19, 2006.¹⁴⁰ In January 2007, Attorney General Alberto Gonzales announced the suspension of the TSP,¹⁴¹ but President Bush expressly reserved the right to reinstitute it at any time.¹⁴² Since taking office, President Obama has not stated otherwise; instead, his administration has refused to take a position on the constitutionality

¹³⁵ Bush Radio Address, *supra* note 10.

¹³⁶ President George W. Bush, Press Conference of the President (Dec. 19, 2005) available at <http://www.nytimes.com/2005/12/19/politics/19text-bush.html>.

¹³⁷ See Bush Radio Address, *supra* note 10; Attorney General Alberto Gonzales, ASK THE WHITE HOUSE (Jan. 25, 2006), <http://georgewbush-whitehouse.archives.gov/ask/20060125.html>.

¹³⁸ Attorney General Alberto Gonzales, Press Briefing by Attorney General Alberto Gonzales and General Michael V. Hayden (Dec. 19, 2005) [hereinafter *Gonzales/Hayden Press Briefing*] available at <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-dni01.htm>.

¹³⁹ *Id.*; General Michael V. Hayden, Address to the National Press Club: What American Intelligence and Especially the NSA Have Been Doing To Defend the Nation (Jan. 23, 2006) available at <http://www.fas.org/irp/news/2006/01/hayden012306.html>; see also *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, U.S. DEP’T OF JUSTICE (Jan. 19, 2006), available at <http://fas.org/irp/nsa/doj011906.pdf> [hereinafter *DOJ White Paper*].

¹⁴⁰ *DOJ White Paper*, *supra* note 139.

¹⁴¹ See Letter from Attorney Gen. Alberto Gonzales to Senate Comm. on Judiciary (Jan. 17, 2007), available at http://www.aclu.org/files/images/general/asset_upload_file372_28043.pdf.

¹⁴² *ACLU v. NSA*, 493 F.3d 644, 712 (6th Cir. 2007) (Gilman, J., dissenting) (describing government’s position at oral argument); *Modernization of the Foreign Intelligence Surveillance Act: Hearing Before the Select Comm. on Intelligence*, 110th Cong. 52-53 (2007) (testimony of Michael McConnell, Director of National Intelligence); Declaration of Joseph J. Brand, Assoc. Dir. of Cmty. Integration, Policy & Records for the NSA, 2 n.1, *Wilner v. Nat’l Sec. Agency*, No. 07 Civ. 3833(DLC), 2008 WL 2567765 (S.D.N.Y. 2008); James Risen, *Administration Pulls Back on Surveillance Agreement*, N.Y. TIMES, May 2, 2007, at A18.

of the TSP and has insisted that no court should rule on it.¹⁴³

The definition of those targeted under the TSP can be interpreted to include an attorney representing an individual or organization suspected of terrorist activity. The Department of Defense has described all detainees in Guantánamo Bay as “terrorists” or “enemy combatants.”¹⁴⁴ Those engaged in representation are necessarily “associated with” and working “in support of” their clients.¹⁴⁵ Lawyers representing Guantánamo detainees appear to fall within the Program’s scope.

Targeting Guantánamo lawyers for surveillance would match other claims by executive officials that the detainees are not entitled to unfettered access to counsel.¹⁴⁶ The possibility of surveillance of Guantánamo attorneys heightened after the Bush administration began to claim that the Guantánamo detainees and their counsel were not entitled to the protections of the attorney-client privilege and work product doctrine. During the Bush and Obama administrations, the federal government has argued to courts that it is entitled to monitor communications between Guantánamo detainees and their lawyers.¹⁴⁷

¹⁴³ Transcript of Proceedings at 5-7, *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60 (2d Cir. 2009) (No. 08-4726) (transcript on file with author); Kearney, *supra* note 12 (reporting on comments at oral argument).

¹⁴⁴ All Guantánamo detainees have been determined by the Department of Defense to be “enemy combatants.” See Gordon England, Sec’y of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba*, AM. FORCES PRESS SERV., July 29, 2004, available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>; Sgt. Doug Sample, *Rumsfeld Says Media Show Only ‘Negative’ Side of Iraq War*, AM. FORCES PRESS SERV., June 28, 2005, available at <http://www.defense.gov/news/newsarticle.aspx?id=16281> (citation omitted).

¹⁴⁵ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712-14 (2010) (reviewing statute under which legal advice or assistance constitutes providing “material support”); Alissa Clare, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651, 667-68 (2005) (arguing government must clarify how material support statutes will be used with respect to lawyers or no counsel will be able to represent those accused of terrorist activity without risking criminal prosecution).

¹⁴⁶ See David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1988-92 (2003) [hereinafter *Guantánamo*].

¹⁴⁷ See, e.g., *Hicks v. Bush*, 452 F. Supp. 2d 88, 99-101 (D.D.C. 2006) (ruling on government’s motion for order allowing interception of attorney-client communications); *In re Guantánamo Detainee Cases*, 344 F. Supp. 2d 174, 186-91 (D.D.C. 2004) (ruling on government’s motion restricting counsel’s access to and use of client information); *Al Odah v. United States*, 346 F. Supp. 2d 1, 8-10 (D.D.C. 2004) (ruling that government could not engage in real-time monitoring of attorney-client communications or review attorney notes and mail between attorneys and clients).

This assertion solidified many attorneys' suspicions that the government had few qualms about intercepting their communications.¹⁴⁸

Government officials never stated publicly that Guantánamo attorneys' phones were tapped, but, in 2006, Assistant Attorney General William E. Moschella confirmed that lawyers acting in their professional capacities were not excluded from TSP surveillance.¹⁴⁹ The *New York Times* reported that two senior DOJ officials admitted "they knew of . . . a handful of terrorism cases . . . in which the government might have monitored lawyer-client conversations."¹⁵⁰ In a few cases, government representatives admitted that attorneys' communications with clients were monitored. In one situation, the U.S. Treasury Department inadvertently delivered to an attorney a logbook, marked "top secret," which reflected NSA monitoring of her calls with her client, a Saudi charity.¹⁵¹ In another situation, federal agents notified Thomas B. Wilner, a partner at Shearman & Sterling LLP who represents a number of Guantánamo detainees, that he was probably subject to surveillance.¹⁵²

The widespread acknowledgements that detainees' attorneys are possible targets of surveillance caused "many prominent criminal defense lawyers [to] say [there] is a well-founded fear that all of their contacts are being monitored by the United States government."¹⁵³ A group of twenty-three Guantánamo attorneys filed a lawsuit under the Freedom of Information Act (FOIA),¹⁵⁴ seeking records from the NSA and DOJ indicating whether or not the attorneys have been targeted.¹⁵⁵

¹⁴⁸ Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, at A1.

¹⁴⁹ Assistant Attorney General William E. Moschella, *Responses to Joint Questions from House Judiciary Committee Minority Members*, U.S. DEP'T OF JUSTICE ¶ 4 (Mar. 24, 2006), available at <http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf>.

¹⁵⁰ Shenon, *supra* note 148, at A1.

¹⁵¹ *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1194-95 (9th Cir. 2007); Patrick Radden Keefe, *Annals of Surveillance: State Secrets*, NEW YORKER, Apr. 28, 2008, at 28.

¹⁵² Declaration of Thomas B. Wilner ¶ 5, *Wilner v. Nat'l Sec. Agency*, No. 07 Civ. 3833(DLC), 2008 WL 2567765 (S.D.N.Y. 2008) [hereinafter Wilner Decl.]. While the veracity of the officials' comments is hard to test, the effect is the same either way: based on a threat of surveillance by a representative of the U.S. government, Mr. Wilner's speech has been chilled.

¹⁵³ Shenon, *supra* note 148, at A1.

¹⁵⁴ 5 U.S.C.A. § 552 (West 2009).

¹⁵⁵ *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 64 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 387 (2010); William Glaberson, *Lawyers for Guantánamo Inmates Accuse U.S. of Eavesdropping*, N.Y. TIMES, May 7, 2008, at A18.

The Obama administration, like the Bush administration, has refused to confirm or deny the surveillance.¹⁵⁶

The case study contained in this Article draws on anecdotal evidence from these twenty-three lawyers, all of whom represent individuals currently or formerly detained in Guantánamo Bay, Cuba,¹⁵⁷ or “next friends”¹⁵⁸ engaged in litigation on behalf of detained family members.¹⁵⁹ The attorneys’ statements presented in this Article are based on declarations publicly filed in the attorneys’ FOIA suit. This set of lawyers is a mixed sample of staff attorneys at nonprofit, human rights, and civil rights organizations, partners and associates at private law firms, and law professors. Through counsel, the clients have initiated civil actions in federal courts based on constitutional, statutory, and international human rights claims. These include petitions for habeas corpus, challenges to conditions of confinement, and civil rights actions for abuse and torture.¹⁶⁰ A number of the litigants also challenge the legality of their prior imprisonment in secret detention facilities operated by the Central Intelligence Agency (“CIA”).¹⁶¹

While many of the cases involve novel challenges to U.S. law, policy, or practice, others turn on evidence more than on legal arguments. For example, many of the detainees claim that they are not

¹⁵⁶ See *Wilner*, 592 F.3d at 64 (NSA and DOJ under Obama asserted Glomar response and expressly taking position that it could neither confirm or deny surveillance).

¹⁵⁷ Some of these lawyers also represent clients detained in Afghanistan or elsewhere, but I will occasionally refer to the group of lawyers as the Guantánamo lawyers for purposes of simplicity.

¹⁵⁸ Though neither a guardian nor a party, a “next friend” may appear in a lawsuit on behalf a plaintiff unable to do so for himself. BLACK’S LAW DICTIONARY 483 (3rd Pocket ed. 2006).

¹⁵⁹ *Wilner v. National Security Agency*, No. 07 Civ. 3833(DLC), 2008 WL 2567765 (S.D.N.Y. 2008). The clients of the lawyers in this sample include most of the men whom government officials have named individually as among the most dangerous people in the world, exactly the sort of people for whom the TSP was created. See sources cited, *supra* note 144.

¹⁶⁰ See, e.g., Complaint, *Celikgogus v. Rumsfeld* (D.D.C. 2007) (06-cv-1996(HHK)), available at http://ccrjustice.org/files/CELIKGOGUS_AmendComplaint.pdf (seeking declaratory relief and damages for prior detention and torture of multiple plaintiffs, in violation of U.S. and international laws); Petition, *Khan v. Bush*, (D.D.C. 2006) (06-cv-01690(RBW)), available at http://ccrjustice.org/files/2006.09.28%20-Habeas%20Petition%20-%20Majid%20Khan_Stamped.pdf. (seeking writ of habeas corpus for individual detainee).

¹⁶¹ See Petition for Writ of Habeas Corpus ¶¶ 38-61, *Khan v. Gates* (D.D.C. 2006) (06-cv-01690 (RBW)), available at http://ccrjustice.org/files/2006.09.28%20-Habeas%20Petition%20-%20Majid%20Khan_Stamped.pdf.

wartime combatants captured from battlefields but ordinary civilians, trapped after bounty hunters kidnapped them from their homes.¹⁶² These clients need their lawyers to establish the veracity of their stories. Other individuals maintain that they have experienced years of physical, sexual, and psychological abuse at the hands of U.S. officials.¹⁶³ Some of these claims involve sophisticated interpretations of precedent, but others depend primarily on access to and the presentation of proof.

B. Effects on Lawyers' Communications

The threat of surveillance has prevented Guantánamo attorneys from guaranteeing the confidentiality of their electronic communications.¹⁶⁴ The stories that follow demonstrate the extent to which the threat of surveillance has hampered their ability to gather evidence, formulate theories, and present facts and arguments to the courts.

First and foremost, the government's threat of electronic surveillance has significantly impaired the lawyers' fact-gathering. Given the risk of electronic eavesdropping, the lawyers have been limited in their ability to initiate or participate in telephone, e-mail, and facsimile communications.¹⁶⁵ The mandates of zealous advocacy dictate that the attorney overturn every stone for information potentially relevant to her client's claims,¹⁶⁶ but, as a matter of both ethics and strategy, she cannot risk revealing confidential information to a third party. This is particularly true where, as here, the eavesdropper is not simply a third party whose presence could disturb the confidentiality of the communications, but the client's sole

¹⁶² See, e.g., Declaration of Gitanjali S. Gutierrez ¶ 24 (referencing the kidnapping and detention of one of the Declarant's clients) [hereinafter Gutierrez Decl.].

¹⁶³ See, e.g., Complaint, Celikogus v. Rumsfeld (D.D.C. 2007) (06-cv-1996(HHK)), available at http://ccrjustice.org/files/CELIKOGUS_AmendComplaint.pdf; Petition, Khan v. Bush, (D.D.C. 2006) (06-cv-01690(RBW)), available at http://ccrjustice.org/files/2006.09.28%20Habeas%20Petition%20-%20Majid%20Khan_Stamped.pdf. (seeking writ of habeas corpus for individual detainee).

¹⁶⁴ E.g., Declaration of John A. Chandler ¶ 5, *Wilner*, 2008 WL 2567765 [hereinafter Chandler Decl.]; Declaration of J. Wells Dixon ¶ 20, *Wilner*, 2008 WL 2567765 [hereinafter Dixon Decl.]; Gutierrez Decl., *supra* note 162, ¶¶ 24-25; Wilner Decl., *supra* note 152, ¶ 8.

¹⁶⁵ E.g., Chandler Decl., *supra* note 164, ¶ 5; Declaration of Tina Monshipour Foster ¶ 20, *Wilner*, 2008 WL 2567765 [hereinafter Foster Decl.].

¹⁶⁶ See MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1983); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).

adversary.¹⁶⁷ Attorney John Chandler explains, "The defendants in my cases are the President of the United States, the Secretary [sic] of the Department of Defense and the commander of the base at Guantánamo. I fear that the NSA might communicate the information obtained to the lawyers for the respondents in my case[s]." ¹⁶⁸

The lawyers and witnesses are especially wary of government seizure of confidential information in the Guantánamo cases, where the potential dangers include the use of intercepted information not simply in a formal proceeding but also in less visible, less regulated arenas. Many of these detainees have experienced physical and emotional abuse while in U.S. custody.¹⁶⁹ Guards have routinely punished detainees who sought access to counsel. Attorney Gitanjali S. Gutierrez explains, "Detainees have been held in solitary confinement for up to 11 days prior to a legal visit . . . ; one detainee reported that he was told the stay in isolation was 'the lawyer's fault' and could have been avoided had no legal visit been scheduled." ¹⁷⁰

Even if the attorneys had reason to trust that the NSA would not reveal their clients' confidences, either to government counsel prosecuting the cases or to guards holding the detainees in physical custody, witnesses have been unconvinced. The threat to confidentiality has thereby distorted the flow of information by impairing, or in some cases fully preventing, the formation of trusting relationships.¹⁷¹ After learning of the possibility of surveillance, numerous witnesses, who might otherwise have provided relevant factual information, ceased communications with counsel or refused to discuss any substantive topics.¹⁷² Even putting aside the subjective chill on speech created by the attorneys' own concerns about wiretapping, the globally publicized possibility of surveillance has curtailed fact-gathering by silencing sources.

¹⁶⁷ MODEL RULES OF PROF'L CONDUCT R. 1.6; see Charlie Cassidy & Cassandra Porsch, *Government Monitoring of Attorney-Client Communications in Terrorism-Related Cases: Ethical Implications for Defense Attorneys*, 17 GEO. J. LEGAL ETHICS 681, 692-94 (2004) (considering attorneys' obligation to challenge or refuse to cooperate with government monitoring).

¹⁶⁸ Chandler Decl., *supra* note 164, ¶ 11.

¹⁶⁹ See, e.g., Declaration of George Brent Mikum IV ¶ 17, *Wilner*, 2008 WL 2567765 [hereinafter Mikum Decl.] (describing controlled drowning of his client, Zayn al-abidin Muhammad Husayn).

¹⁷⁰ Gutierrez Decl., *supra* note 162, ¶ 35.

¹⁷¹ FREEDMAN & SMITH, *supra* note 43, at 127-28.

¹⁷² E.g., Chandler Decl., *supra* note 164, ¶ 5; Foster Decl., *supra* note 165, ¶ 20; Gutierrez Decl., *supra* note 162, ¶ 24; Declaration of Brian J. Neff ¶ 26, *Wilner* 2008 WL 2567765. It is worth noting that fear may constrict lawyers' and witnesses' thinking even more narrowly than they consciously intend.

The looming threat of surveillance has changed the attorneys' communications both quantitatively and qualitatively — not only blocking the flow of information, but also distorting what gets through. Because electronic communications have become risky or impossible, Guantánamo lawyers have searched for alternative avenues of communication and many have resorted to in-person meetings or mail couriers to communicate around the globe.¹⁷³ These mediums of communication have slightly expanded the set of information available to the attorneys but have added significant burdens to the representation of Guantánamo detainees.

Foreign travel has been expensive, time-consuming, and, in some instances, wholly impracticable. Many individuals with information relevant to the detainees' cases live in Middle Eastern countries to which flights from the United States are a luxury that neither lawyers at nonprofit organizations, nor even well-heeled law firm partners, can always afford.¹⁷⁴ Some trips were made, but not with the frequency necessary to keep clients informed and prepare cases in the manner the attorneys considered appropriate. In some situations, foreign travel would have risked the attorneys' safety, because of the conditions in the countries where witnesses or clients resided.¹⁷⁵ In others, in-person communications were legally foreclosed. Saudi Arabia, for example, denied the visa applications of the Center for Constitutional Rights ("CCR"), making it effectively impossible for the attorneys from this organization to gather evidence from their Saudi clients' families.¹⁷⁶

Attorneys in some instances resorted to postal communications to supplement foreign travel. Operating without real-time communications not only slowed the flow of information but also seems to have impaired the attorneys' understanding of the information conveyed. Without clarifying or follow-up questions, these limited communications may leave the advocate operating with an incomplete or inaccurate set of facts.¹⁷⁷ Miscommunications, all the more likely across boundaries of language and culture, may be overlooked and unresolved in the absence of back-and-forth

¹⁷³ E.g., Dixon Decl., *supra* note 164, ¶ 20; Declaration of Candace Gorman ¶ 18, Wilner, 2008 WL 2567765 [hereinafter Gorman Decl.]; Gutierrez Decl., *supra* note 162, ¶¶ 24-25.

¹⁷⁴ *Id.*

¹⁷⁵ E.g., Gutierrez Decl., *supra* note 162, ¶¶ 25, 27, 36; Declaration of Joseph Margulies ¶ 9, Wilner, 2008 WL 2567765.

¹⁷⁶ Gutierrez Decl., *supra* note 162, ¶¶ 24, 27.

¹⁷⁷ *Id.* ¶ 25.

dialogue.¹⁷⁸

In addition to the obstacles imposed on fact-gathering communications, the impediments to real-time, multi-party communications like telephone conferences have restricted the Guantánamo attorneys' opportunities for collaborative dialogue with co-counsel and experts.¹⁷⁹ Such limits on the free formulation and exploration of ideas may stunt the development of factual and legal theories.¹⁸⁰ One might argue that brainstorming about strategy with colleagues is particularly vital for lawyers facing unprecedented legal hurdles to their clients' constitutional rights.

C. Effects on Court-Directed Advocacy

As described in the previous section, the threat of wiretapping has impeded the factual and legal development in the Guantánamo cases, but the next consideration is whether and to what extent that impediment truly has First Amendment implications. This section questions the extent to which the curtailment of communications affected the ability of the lawyers to protect their clients' individual rights, disseminate ideas into the public marketplace, or restrict abuses of government power.

Unfortunately, the degree and significance of the restriction is difficult to assess. Measuring the full implications of the chilled communications would require a hypothetical assessment of what might have existed under circumstances that did not transpire. To measure the communication that was stifled before reaching the judiciary, one would need to assess the facts and witnesses never discovered, the creative theories never developed, and the cases never accepted.

One area that permits measurement is the passage of time. In a case in which attorney Gitanjali S. Gutierrez represented an individual challenging his enemy combatant status, communications with witnesses were impeded for roughly twelve months.¹⁸¹ The detainee had filed a habeas corpus petition challenging his detention as an enemy combatant. He alleged that he was not captured in combat on

¹⁷⁸ See Susan Bryant & Jean Koh Peters, *The Five Habits of Cross Cultural Lawyering*, reprinted in *RACE, CULTURE, PSYCHOLOGY, AND LAW* 57-59 (Kimberly Holt Barrett & William H. George eds., 2004).

¹⁷⁹ Gutierrez Decl., *supra* note 162, ¶ 23.

¹⁸⁰ As the Supreme Court has highlighted in its work product doctrine, the threat of disclosure can cramp lawyers' thinking and, therefore, their representation of their clients. See *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

¹⁸¹ See Gutierrez Decl., *supra* note 162, ¶ 24.

the battlefield, but rather kidnapped from his home in the middle of the night by bounty hunters and, therefore, did not fit the definition of an enemy combatant.¹⁸² The attorney's communications with the first-hand witness to the kidnapping, the client's brother, were delayed until she was able to fly to Pakistan. Given the constitutional significance of any of extension of time of imprisonment,¹⁸³ such interference may be interpreted to have compromised the client's individual rights.

Beyond any harm to the individual detainees' cases, the open possibility that the government has been monitoring the lawyers' communications has threatened the attorneys' unrelated practices.¹⁸⁴ In large private firms, phone and fax lines may be monitored, thereby jeopardizing the firm's practice based on the choices of a few associates and partners to represent Guantánamo detainees. Some of these firms represent international clients with commercial cases pending against the government.¹⁸⁵ The case study did not include any evidence of clients seeking other counsel due to the threat of government surveillance, but this might have occurred without any record of it. One attorney explained that because of the wholesale threat of surveillance, she "stopped taking on new cases."¹⁸⁶ In these ways, the chilling effects of the threat of surveillance have caused some lawyers to risk loss of employment or to no longer accept representation of Guantánamo detainees.

Government threats to the Guantánamo attorneys' law practices have the potential to constrict the supply of lawyers able and willing to represent the detainees. It is worth noting that the Guantánamo litigation does continue today; it is not the case that all such representation has dried up. Nonetheless, because of the role of the Guantánamo litigation in criticizing U.S. policies and practices, and checking potential abuses of power by legislative and executive actors, such constrictions on the flow of messages to the judiciary deserve special attention.

V. LESSONS OF GUANTÁNAMO FOR A THEORY OF LITIGATION AS EXPRESSION

Drawing on the case study of Guantánamo lawyers allows us to

¹⁸² *See id.* (indicating detainee was kidnapped prior to detention).

¹⁸³ *See* *Glover v. United States*, 531 U.S. 198, 203 (2001).

¹⁸⁴ Wilner Decl., *supra* note 152, ¶ 7.

¹⁸⁵ *See id.* ¶ 8.

¹⁸⁶ Gorman Decl., *supra* note 173, ¶ 18.

return to the earlier Supreme Court cases with renewed appreciation of the First Amendment significance of lawyers' communications in support of litigation.¹⁸⁷ The scenario described above appears, in many ways, to be a perfect candidate for recognition of litigation as political expression. At the same time, the case study highlights the challenges of recognizing any lawyer's communications in support of litigation as political expression.

A. Defining "Political" Litigation

The Supreme Court has historically distinguished attorney communications that are political expression, entitled to the highest First Amendment protection,¹⁸⁸ from those that are only commercial speech, entitled to intermediate scrutiny.¹⁸⁹ Distinguishing litigation as a form of political expression from "ordinary"¹⁹⁰ litigation may be a difficult exercise in line-drawing.

Five key factors emerge from Supreme Court jurisprudence as determinative of whether litigation should be protected as political expression: (1) whether the litigation is motivated by "political aims";¹⁹¹ (2) whether the client or potential client is a "disenfranchised" "minority"; (3) whether the litigation advocates an "unpopular,"¹⁹² "controversial,"¹⁹³ or "dissident"¹⁹⁴ viewpoint; (4) whether the legal services are provided free of charge; and (5) whether the government is an adversary. I do not mean to suggest that all five factors are necessary for advocacy to be protected as political

¹⁸⁷ The descriptions provided are based on the experiences of a relatively small group of attorneys, and of course their own perceptions and motivations might influence the dynamics they observe and report. Like any qualitative analysis based on a small sample, this analysis serves not to prove with certainty any maxim about the laws of human nature, but rather to shed light on the mechanisms of a particular problem, this one created by governmental intrusions into attorneys' communications.

¹⁸⁸ Compare *In re Primus*, 436 U.S. 412, 439 (1978) (protecting solicitation as political speech) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458-59 (1978) (applying lower level of review for solicitation not alleged to be political speech).

¹⁸⁹ See, e.g., *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 634-35 (1995) (interpreting attorney advertisements as "pure commercial speech"). See generally *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563-65 (1980) (identifying intermediate scrutiny test for commercial speech).

¹⁹⁰ *NAACP v. Button*, 371 U.S. 415, 420 (1963).

¹⁹¹ *In re Primus*, 436 U.S. at 427; see *Button*, 371 U.S. at 429; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

¹⁹² *In re Primus*, 436 U.S. at 427-28.

¹⁹³ *Patterson*, 357 U.S. at 460.

¹⁹⁴ *Button*, 371 U.S. at 431.

expression, but rather each is a consideration that appears to add weight in favor of such a determination. Drawing on the Guantánamo example, I will briefly explore each of these factors to clarify their meaning, purpose, and utility for developing a theory of litigation as political expression.

1. Political Motivation

Litigation that is motivated by political aims has been recognized by the Court as political.¹⁹⁵ While this seems intuitively correct, numerous definitional questions emerge. These questions are far more substantive than semantic.

As an initial matter, one must ask whose motivation is to be assessed. In the NAACP cases, the Court focused on the aims of the organization and had no occasion to distinguish those of the individual members or their representative.¹⁹⁶ In *Primus*, this distinction became more significant because, while Edna Primus and the ACLU had political motivations for their solicitation efforts, those efforts were unsuccessful, and the potential client was distinctly uninterested in the lawyers' agenda. In *Primus*, the Court was focused on the ACLU's motivations and those of Ms. Primus.¹⁹⁷

The notion of public interest lawyers with social justice goals of their own, separate from the interests of their clients, has always raised the potential for conflicts of interest.¹⁹⁸ If the lawyer's litigation activities, including speech in support of litigation, serve a public role, further consideration must be given to defining the lawyer's duty to the individual client. This may be more of an ethical question than a doctrinal one, but it highlights the need for clarity regarding whose motivations ultimately define the nature of the litigation. If there is a conflict, allowing the lawyer's perception to trump the client's seems to contradict principles of agency.¹⁹⁹ At the same time, under the current doctrine, if either a lawyer or a client is motivated by political goals, that commitment should be sufficient to find the litigation

¹⁹⁵ *In re Primus*, 436 U.S. at 427; see *Button*, 371 U.S. at 429; *Patterson*, 357 U.S. at 460-61.

¹⁹⁶ See *Button*, 371 U.S. at 429-30; *Patterson*, 436 U.S. at 459-61.

¹⁹⁷ *In re Primus*, 436 U.S. at 427-28.

¹⁹⁸ See Lobel, *supra* note 77, at 548, 555 (describing movement lawyer's obligation to make strategic decisions based on goals of clients and "the political movement they represent," and recognizing potential conflicts between "movement" and individual clients).

¹⁹⁹ Lobel suggests that lawyers must follow their clients' lead regarding the strategic decisions, rather than following their own political "instincts." *Id.*

politically motivated.

Even more complicated than identifying the principal actor whose motivation governs, however, is the matter of defining “political aims.” Must the aim be to make direct social change through a judicial decision? The *NAACP* and *Primus* decisions concerned litigation that explicitly disseminated political messages in the form of legal claims. Yet, as Jules Lobel argues, courts provide, in a less explicit but perhaps even more significant way, an amplified platform for attracting public attention for expression of dissent against government policies.²⁰⁰ Even when a court cannot or will not directly stay the hand of another government actor, litigation may do so indirectly through “persistent and persuasive appeals to the public consciousness.”²⁰¹ Lobel suggests that litigation has historically galvanized support for social movements by lending credibility to activists’ positions and putting added pressure on targeted parties.²⁰² Because these less direct forms of messaging also serve the marketplace of ideas and facilitate checks on abuses of government power, these forms of litigation should also be considered political.

The Supreme Court has left it unclear whether “political” litigation includes only litigation that aims to secure broad-scale changes in the law, or if individual cases without significant precedential weight also reflect First Amendment values. The Court has historically recognized the First Amendment value in constitutional litigation challenging government policy but not in individual representation of poor people or criminal defendants. In *Button*, the Court highlighted that the *NAACP* did not handle what the Court labeled “ordinary damages actions” nor represent criminal defendants without allegations of race discrimination.²⁰³ In *Velazquez*, though the Court struck down the restrictions on welfare litigation, it did not explicitly endorse a notion of civil legal services as political.²⁰⁴

²⁰⁰ *Id.*

²⁰¹ See Blasi, *Checking Value*, *supra* note 61, at 550 (asserting that although marketplace of ideas does not guarantee that truth prevails, freedom of speech leaves open theoretical possibility of rational persuasion).

²⁰² Lobel, *supra* note 77, at 479-80; *see id.* at 486 (disputing assertions that courts are not institutions that make effective social change); *but see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 33-35, 245-46 (1991).

²⁰³ *NAACP v. Button*, 371 U.S. 415, 420 (1963).

²⁰⁴ Interestingly, the Legal Services Corporation in *Velazquez* tried to make exactly this distinction — permitting legal services lawyers to represent claimants in individual welfare hearings yet banning federal challenges to the governing welfare laws — and was found to violate the First Amendment. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001).

As the Guantánamo example helps to show, some individual representation is political even if it appears to reflect no explicit claims concerning large-scale social policies. The attorneys in the case study view their role as both protecting individual rights and challenging federal policy in the War on Terrorism.²⁰⁵ As attorney Clive Stafford Smith explains, “[I]n the representation of these clients, the main work has been to (legitimately) challenge every aspect of the secrecy regime possible.”²⁰⁶ Excluding individual representation from the definition of political litigation could exclude a case of a detainee challenging his individual status as an enemy combatant, given that such litigation might be based on the facts of his case — whether or not he was not captured from a battlefield — rather than a broad critique of U.S. policy. Yet the Guantánamo litigation has been undertaken as part of a larger concerted effort that is indisputably political. The line between classic public interest lawyering and individual representation is hazier than the Supreme Court has suggested. Motivations for litigation can change over time as facts emerge and theories develop. As Mr. Stafford Smith attests, litigation can also be based on dual motives from the beginning.

The Guantánamo cases illustrate the conceptual difficulties of separating litigation to protect individual rights from that aimed at larger social change.²⁰⁷ Many “ordinary” public defenders²⁰⁸ and civil legal services attorneys²⁰⁹ view their work as inherently political and

²⁰⁵ See, e.g., Declaration of Michael Sternhell ¶ 16, *Wilner v. Nat’l Sec. Agency*, No. 07 Civ. 3833(DLC), 2008 WL 2567765 (S.D.N.Y. 2008) (“I consider it an honor and privilege to represent innocent men who have been denied due process and the opportunity to prove their innocence before a court of law. And I consider it my duty as a lawyer to contest my government’s efforts to violate the Constitution . . . in its extralegal detention of my clients and other prisoners at Guantánamo . . .”).

²⁰⁶ Declaration of Clive A. Stafford Smith, ¶ 22, *Wilner*, 2008 WL 2567765; see also, e.g., Dixon Decl., *supra* note 164, ¶ 29 (“I believe that ensuring basic due process rights for anyone detained by the Executive Branch is consistent with traditional principles of American justice and the highest standards of our legal system.”); Mikum Decl., *supra* note 169, ¶ 21 (“It is important that I be allowed to represent my client . . . who is falsely accused and wrongfully tortured.”).

²⁰⁷ See Thomas M. Hilbink, *You Know the Type: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 662-90 (2004) (dividing cause lawyers into proceduralist, elite/vanguard, and grassroots).

²⁰⁸ Smith, *supra* note 46, at 953 (describing criminal defense activity as participation in larger movement for social change).

²⁰⁹ See, e.g., SOUTH BROOKLYN LEGAL SERVICES, <http://www.sbls.org> (last visited Apr. 1, 2011) (“The mission of South Brooklyn Legal Services is to seek equal justice for low-income people in Brooklyn by providing a broad range of legal advocacy and information, helping empower poor people to identify and defeat the causes and effects of poverty in their communities.”).

social justice-oriented.²¹⁰ All of these categories of litigation may be political,²¹¹ and the distinction between “political” lawyering and “ordinary” lawyering may be unworkable.²¹²

Given this context, courts assessing the accuracy and veracity of a party’s claims of “political aims” are in a difficult situation. Trying to puzzle through the philosophical meaning of “political” is no answer. This is partly because judges are not philosophy experts, but also because the doctrinal inquiry has a different purpose: isolating that category of activity that society has chosen to protect, perhaps largely for instrumentalist reasons. One might suggest the following approach: if the lawyer represents that the litigation has political aims, her assertion should resolve this prong of the inquiry.²¹³ While this may seem overly deferential to the party claiming a First Amendment interest, erring in the other direction takes us back into the morass of unwise and unworkable inquiries.²¹⁴ Admittedly, in theory, any attorney could make a bald assertion of political motivation, but hopefully consideration of other factors, discussed below, will decrease the frequency of such occurrences.

As a final note on distinguishing when litigation is motivated by

²¹⁰ See STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 94-95 (2004) (identifying cause lawyers focused on empowering individual clients).

²¹¹ The deeper meaning of “political litigation” is beyond the scope of this article. All litigation is political in that it concerns the ordering of social relations. See *id.* (broadly defining cause lawyering to include widely varying forms “directed at altering some aspect of the social, economic, and political status quo”). Just as an example, an “ordinary” welfare case or landlord-tenant dispute concerns the redistribution of wealth and property. See Tarkington, *supra* note 69, at 388 & nn.157-58. Nonetheless, it may be that certain forms of litigation have a more direct connection to political speech than others and, where the connection is too tenuous, we may not extend the same protection.

²¹² See Stuart A. Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT’L J. LEGAL PROF. 209, 229-36 (1998).

²¹³ With the exception of *Velazquez*, which was not overtly political, the litigation-as-expression cases have highlighted the attorneys’ demonstrated political ideologies, pointing to their affiliations and past litigation activities. See, e.g., *In re Primus*, 436 U.S. 412, 414-15 & n.1-2 (1978) (describing Ms. Primus’ affiliation with ACLU, ACLU’s history, and organization’s stated mission); *NAACP v. Button*, 371 U.S. 415, 419-22 & n.5 (1963) (describing history and structure of NAACP and NAACP LDF). A full-blown evidentiary examination of the attorneys’ motivations could become an unwieldy sideshow and obstacle to litigation, but an affirmation of one’s political intent seems a reasonable requirement.

²¹⁴ For a discussion of the unworkability of recognizing any litigation as political expression, see *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 642-43 (1980) (Rehnquist, J., dissenting).

political aims, one difference that may be observed between the litigation-as-political-expression precedent and the Guantánamo example is that, in the former set of cases, to determine the motivation behind the litigation, the Court referenced the past activities of the organization with which the attorney was associated,²¹⁵ but many of the Guantánamo attorneys are private counsel associated with no political organization.²¹⁶ It seems a matter of common sense that an attorney can engage in litigation for political purposes even if not a member of a traditional political organization.²¹⁷ Further, society is best served if courts protect these private lawyers, so that they are able to provide pro bono representation to clients who might otherwise be unrepresented. The rationale behind recognizing litigation as political expression is not based on the intrinsic, pre-political rights of the lawyers but the effects on the marketplace of ideas and promotion of self-government by the people. With these principles in mind, the speech of private, unassociated attorneys should be treated no differently from that of their nonprofit colleagues.

2. Minority Client or Potential Client

The second factor the Court has emphasized is whether the litigants are part of a minority segment of society for whom litigation may be the most effective, or only, form of political expression.²¹⁸ This

²¹⁵ See, e.g., *In re Primus*, 436 U.S. at 414-15 & n.1-2; *Button*, 371 U.S. at 419-22 & n.5. A full-blown evidentiary examination of the attorneys' motivations could become an unwieldy sideshow and obstacle to litigation, but an affirmation of one's political intent seems a reasonable requirement.

²¹⁶ The Supreme Court has previously recognized as a right of association the right of a union to disseminate legal information, make referrals to attorneys, collectively hire counsel, or negotiate fee agreements for individual members, even where, arguably, the litigation did not have a political aim. See generally *United Mineworkers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967) (worker's compensation); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964) (personal injury claims against employer). I would suggest that, in these cases, the Court recognized the activity as protected because it concerned federal statutes regulating the social relationship between unions and management. One might argue that the union is necessarily a political organization, for which the rule should be different than for an attorney or other individual not associated with a political organization. Along these lines, one might suggest that, for the speech of a lawyer not associated with a political organization to be given the highest level of First Amendment protection, the litigation must be aimed at disseminating a political message. The problem of course becomes defining that category of litigation.

²¹⁷ See SCHEINGOLD & SARAT, *supra* note 210, at 74.

²¹⁸ See *Button*, 371 U.S. at 431.

emphasis reflects political process theory,²¹⁹ under which judicial scrutiny will expand to protect “discrete and insular minorities”²²⁰ that cannot fairly compete in the political process.²²¹ Under this view, because the political process is controlled by majoritarian forces, full access for minorities requires the judiciary to ensure that the majority does not use its position to disadvantage a minority based on hostility or prejudice, and also, the courts take on a special role in clearing blocked channels of political change.²²²

The litigation-as-expression cases reflect the values of process theory. In protecting court-directed expression, the Court was interested not so much in resolving the individual grievances of the parties but in facilitating minority contributions to public dialogue. This may be interpreted as promoting those individuals’ and groups’ right to participate equally in self-government²²³ as well as upending targeted obstacles to political change.²²⁴ To the extent that one values the substantive outcomes as well, it may also be explained as actively facilitating public discourse or correcting for failures in the marketplace of ideas, so that diverse ideas have the amplification they need to reach the public and get vetted.²²⁵

Recognizing litigation as a form of political power over which lawyers have a monopoly, and appreciating the barriers minorities face in accessing other levers of power, the Court has protected litigation to support those lawyers who make the societal contribution of ensuring that minority voices can be heard. Combining this jurisprudence with the Court’s insight in *Velazquez* that protecting attorneys’ advocacy supports the court’s role in maintaining the

²¹⁹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75 (1980).

²²⁰ *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

²²¹ See Tsai, *supra* note 56, at 871-72 nn.185-87. But see ROSENBERG, *supra* note 202, at 10-21, 30-36 (disputing that courts are institutions of social change); Jules Lobel, *The Political Tilt of the Separation of Powers*, in *THE POLITICS OF LAW* 591, 608 (David Kairys ed., 1998) (suggesting that separation of powers prevents radical change, though it can prevent abuses of power).

²²² Luke P. McLaughlin, *The Elysian Foundations of Election Law*, 82 TEMP. L. REV. 89, 99 (2009).

²²³ Lobel, *supra* note 221, at 608 (describing litigation as “expand[ing] the points of access to government,” which may be especially important when one branch overreaches).

²²⁴ See McLaughlin, *supra* note 222, at 99.

²²⁵ See generally Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991) (comparing process theory with notion that substantive values justify judiciary’s role in overturning democratically expressed will of people).

balance of government powers suggests that protecting attorneys' advocacy on behalf of minorities has particular value, and government intrusions on it should receive particular scrutiny. In this way, factor two mirrors factor five, discussed below, which supports checks on abuses of government power.

An obvious question that remains is how to define the minorities who receive special protection. One could draw upon equal protection jurisprudence and rely on the accepted categories of suspect classes or discrete and insular minorities,²²⁶ but, if protecting access to courts is designed to correct imbalances in the democratic process, there is a fatal flaw in the solution of focusing on such groups. The Achilles' heel of First Amendment theory and justifications for the adversary system is that the poor are generally not recognized within the category of persons in need of protection.²²⁷ Yet, one might argue that the poor are far less powerful than any other social group.²²⁸

Turning to the example of Guantánamo highlights this contradiction. James Forman argues that some of the detention tactics used in the War on Terrorism are strikingly similar to everyday practices of the American criminal justice system, and the detainees are receiving far better representation.²²⁹ Without undercutting the importance of the work, or the undeniably grueling conditions, it must be admitted that representation of Guantánamo detainees, though once a radical project of CCR, has now attracted significant numbers of high-profile lawyers who see these cases as high stakes litigation. One might argue that, in spite of all the evidence of the chilling effects of surveillance, there is no shortage of detainee lawyers. In contrast, due to funding constraints that leave poor people's lawyers with enormous caseloads, the "process" most poor

²²⁶ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (ruling that "aliens" are "prime example of a 'discrete and insular' minority" warranting "heightened judicial solicitude," and striking down laws conditioning welfare benefits on citizenship).

²²⁷ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973) (refusing to recognize poor as suspect class).

²²⁸ Although the poor have generally not been recognized as a suspect class or a discrete and insular minority in the Supreme Court's equal protection jurisprudence, one could argue that the poor have been recognized as such, albeit indirectly, in the litigation-as-expression context. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 535 (2001) (ruling that restriction on speech of poor people's lawyers violated First Amendment, in part because of lack of alternative channels for communication); *In re Primus*, 436 U.S. 412, 415-16 (1978) (protecting solicitation as political speech, where lawyer sought to represent poor women sterilized as condition of receiving Medicaid).

²²⁹ James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 348-59 (2009).

Americans receive in “ordinary” criminal cases is so limited by time as to be meaningless.²³⁰ Further, poor people at risk of losing their homes, jobs, and other basics of economic survival are not entitled to lawyers, and, unlike the Guantánamo detainees whose cases appeal to high-profile volunteers, “ordinary” poor people are expected to negotiate the adversary system without representation.²³¹

Ultimately, assessing and defining the client’s minority status as an indicator of whether litigation should be protected as political expression depends on the First Amendment value one prioritizes: deliberative process or improving the quality of self-government. If providing a forum for participation by all citizens (and perhaps correcting for failures in the marketplace of ideas) is crucial, then litigation on behalf of minorities or otherwise disenfranchised persons should receive special attention. Defining this category will then require further exploration. If, however, like Professor Blasi, one puts a premium on the checking value in the First Amendment, then protecting the vulnerable may be less important than protecting those in the best position to block governmental abuses of power. For Blasi, elites play a special role in the First Amendment. He believes that all citizens’ abilities to understand and combat government power depend on the intellectual and financial resources of professional critics.²³² Blasi identifies journalists in particular as such critics, but lawyers would also fit that role. Even under Blasi’s checking approach, however, it may be important to protect litigation on behalf of minorities, if one believes those persons are the most likely to be the subjects of government abuses of power. They may also be the people most likely to lodge radical critiques of it.

3. Dissident or Unpopular Viewpoint

Supreme Court precedent has given some support to the checking theory, particularly in decisions that have protected litigation that advanced a dissident or unpopular viewpoint.²³³ The *Primus* Court did not consider the status of women or poor people as a disenfranchised class, nor did it address explicitly the controversial nature of forced sterilization, but it protected solicitation efforts towards such persons,

²³⁰ *Id.* at 364-66.

²³¹ *Id.*

²³² Blasi, *Checking Value*, *supra* note 61, at 541-42.

²³³ See *In re Primus*, 436 U.S. at 428 (emphasizing ACLU’s role in protecting “unpopular causes” and “political dissent”); see also Blasi, *Checking Value*, *supra* note 61, at 527 (prioritizing opposition to governmental abuses of power as key purpose of First Amendment).

as a form of political expression, based on the importance of advocating on behalf of “unpopular causes and [persons].”²³⁴ The Court generally has not distinguished unpopular or dissident *viewpoints* from unpopular or minority *clients*, but the categories ought to be examined separately because they reflect different emphases with respect to First Amendment theory.²³⁵ It depends whether the primary purpose is to protect the speaker’s autonomy and right of participation or the dissemination of information to the community of listeners to enable good government. Protecting the unpopular client follows process theory in that it aims to increase disenfranchised citizens’ access to the deliberative process. Protecting viewpoints, however, particularly dissident viewpoints, may be more significant for improving the quality of the democratic government, and, in particular, safeguarding the checking function of the people.

Jules Lobel argues that protecting unpopular, dissident viewpoints carries distinct value because of the role that courts can play in providing opportunities for the expression of dissent when other avenues are less potent.²³⁶ He suggests that the early Guantánamo litigation proved to be a key method of drawing public attention to previously neglected aspects of U.S. policy.²³⁷ This litigation helped to attract media and galvanize a small social movement. While knowledge and criticism of U.S. detention policies in Guantánamo may seem common now, when CCR first began this litigation, these lawyers were advancing a minority view.²³⁸ Perhaps, where representation falls into both categories — vulnerable clients and dissident viewpoints — it raises an additional red flag to protect the litigation as expression.²³⁹

4. Services Provided Free of Charge

A key feature of the litigation-as-expression cases has been the

²³⁴ *In re Primus*, 436 U.S. at 427-28.

²³⁵ An unpopular, dissident viewpoint could theoretically be advanced on behalf of a politically powerful client. As just one example of the distinction, if Philip Morris advocated an end to smoking bans, that position would face stiff political opposition, though the corporation enjoys financial resources that would allow it to reach multiple avenues to disseminate its views.

²³⁶ Lobel, *supra* note 77, at 479-80.

²³⁷ *Id.* at 489, 556-60.

²³⁸ *See id.* at 560.

²³⁹ *Primus* particularly highlighted the importance of litigation at the nexus between unpopular viewpoints and disenfranchised clients. *See In re Primus*, 436 U.S. at 427-28.

Court's emphasis on the lawyers' pursuit of political as opposed to remunerative aims. Before concluding that the solicitation in *Primus* constituted political expression entitled to the highest level of First Amendment protection, the Court spent considerable time discussing the fee agreement between the ACLU and cooperating attorneys, highlighting that the case was not one where the income of the attorney engaged in solicitation depended on the outcome of the litigation.²⁴⁰ In contrast, the same day as it decided *Primus*, the Court issued an opinion in *Ohralik v. Ohio State Bar Ass'n*, in which it held that "[i]n person solicitation by a lawyer of remunerative employment is a business transaction," and a ban on such activity warrants only intermediate scrutiny.²⁴¹ This pair of cases suggests that only unpaid litigation, and speech in support thereof, can count as political expression.

Some members of the Court have argued that earning one's living is not necessarily mutually exclusive from pursuing politically expressive aims through one's work. Some have suggested that the mythological divide between professionalism and remuneration is largely an artifact based in discrimination against certain classes of lawyers and is divorced from "the real-life fact that lawyers earn their livelihood at the bar."²⁴² Even attorneys employed by political organizations are paid; in most cases, the check simply comes from a grant instead of a client. Importantly, if there were no finances supporting political litigation, it simply could not be sustained.²⁴³ In the Guantánamo example, one of the difficulties the private pro bono counsel face is that the wiretapping has threatened their economic viability by interfering with the representation not only of the Guantánamo detainees but also of their paying clients.

In spite of these pragmatic observations, if a primary purpose behind recognizing speech in support of litigation is to keep open a

²⁴⁰ *Id.* at 436 n.30.

²⁴¹ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978).

²⁴² *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977). In particular, fee-shifting statutes encourage private attorneys general to support the enforcement of laws with strong public policy rationales, and many consider such litigation to be classic public interest litigation. See David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 241-44 (2003) [hereinafter *Taking Out the Adversary*]; Tsai, *supra* note 56, at 889-95.

²⁴³ See Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873, 881 (2002); David C. Vladeck, *In re Arons: The Plight of the "Unrich" in Obtaining Legal Services*, in LEGAL ETHICS STORIES 255, 261, 284-86 (Deborah L. Rhode & David J. Luban eds., 2006).

channel of communication uniquely available to disenfranchised persons, this justification may be strongest where the legal services are offered free of charge. As Deborah Rhode has pointed out, rationalizations for the lawyer's role as a zealous advocate may lose value when partisans are allocated by the market.²⁴⁴ Adding special protection for those providing free services may compensate somewhat for market forces and help to ensure a wider range of views than those the marketplace otherwise would provide in court and elsewhere. The absence of a pecuniary incentive might also help to reveal whether the motivation of the lawyer is truly political and to exclude solicitation from heightened protection where, as in *Ohralik*, the speech coerces a vulnerable client to agree to representation.²⁴⁵ Admittedly, there may be overzealous public interest attorneys who, with political motives rather than financial ones, still have difficulty accepting "no" as an answer from a potential client. Yet, hopefully, the financial factor should filter out a subset of the most egregious cases. Though implementing this factor may become challenging, democratic values provide attractive reasons to take into account whether the client pays for the adversary work.²⁴⁶

5. Government Adversary

Finally, although not always highlighted by the Court, the litigation-as-political-expression cases have been grounded, at least implicitly, in struggles against legislative or executive power.²⁴⁷ This may be with good reason. The functioning of the system of checks and balances requires safeguarding the ability of the judiciary to check any excesses by the other branches and, arguably, safeguarding lawyers' ability to play their supporting role.²⁴⁸ When litigation aims to bring to the judiciary complaints regarding the actions of other government actors, efforts by those actors to block the litigation necessarily raise

²⁴⁴ Rhode, *Ethical Perspectives*, *supra* note 48, at 611-12.

²⁴⁵ *Ohralik*, 436 U.S. at 461.

²⁴⁶ Another possibility, somewhat more nuanced than the Court's dichotomy between paid and unpaid litigation, might expand the category of highly protected litigation to include services offered at a significantly below-market rate, on the basis that they compensate for failures in the marketplace, or where legal services are compensated under a fee-shifting statute designed to sustain litigation that will correct social ills. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 208-09 (1997) (describing legislative intent behind fee-shifting provisions).

²⁴⁷ See *NAACP v. Button*, 371 U.S. 415, 429 (1963).

²⁴⁸ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

significant questions with respect to the functioning of the balance of powers.²⁴⁹ As a simple matter of logic, if legislative or executive actors can constrict criticisms of their actions, they can directly impede not only the marketplace of ideas but also the process of self-government by the people.

Vincent Blasi has emphasized that the abuse of power by a government actor brings special dangers,²⁵⁰ and the Guantánamo case study provides dramatic examples of this phenomenon. The government is not an “ordinary” adversary but rather one with extraordinary power over the individual litigant and society as a whole. The government has an unparalleled breadth of coercive tools at its disposal.

As described above, the implementation of the Terrorist Surveillance Program, and announcements describing its broad contours, have reached large swaths of society, both within the United States and across borders. The executive and legislative branches of the U.S. government have also taken steps beyond wiretapping, which constrict the ability of counsel to consult with and obtain evidence on behalf of the detainees.²⁵¹ U.S. officials have blocked in-person attorney-client communications. As David Luban documented in *Lawfare and Legal Ethics in Guantánamo*, guards have misrepresented to attorneys that clients were uninterested in communicating with counsel, and have sown mistrust between detainees and lawyers by disparaging the attorneys to their clients and telling the detainees that the attorneys are government interrogators.²⁵² In 2007, the Deputy Assistant Secretary for Detainee Affairs condemned the Guantánamo lawyers on National Public Radio and suggested that corporate clients should boycott their law firms.²⁵³ The Deputy had scripted portions of his

²⁴⁹ See *id.*

²⁵⁰ Blasi, *Checking Value*, *supra* note 61, at 538-39.

²⁵¹ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 764 (2008) (ruling that Congress overstepped in Military Commissions Act, which deprived federal courts of jurisdiction over habeas corpus petitions for alleged enemy combatants).

²⁵² J. Wells Dixon reports guards at Guantánamo “routinely informed my clients that they have ‘reservations’ — i.e., interrogations [by government agents] — when they are actually scheduled to meet with me . . . [and on another occasion,] a military officer lied to me directly about a client’s willingness to meet with me.” Dixon Decl., *supra* note 164, ¶28. The latter occurred while his client’s case was pending before the Supreme Court. *id.*; see also Luban, *Guantánamo*, *supra* note 146, at 1990-91.

²⁵³ Interview by Jane Norris with Deputy Assistant Sec’y of Def. for Detainee Affairs Charles Stimson (National Public Radio broadcast Jan. 11, 2007) (partial transcript available at http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott) (Deputy Assistant Secretary of Defense for Detainee Affairs Charles Stimson announced, “[W]hen corporate CEOs see that [the major law] firms are

radio announcement in advance, and it reflected the government's position at that time.²⁵⁴

The legislature has also taken actions that have limited detainees' access to lawyers and courts. In a "material support" statute that criminalizes activities in support of terrorist organizations, Congress included the provision of legal expertise within the definition of material support and, thereby, cut off certain groups' access to lawyers.²⁵⁵ Congress also directly undercut the power of the judiciary by passing legislation that stripped federal courts of jurisdiction over habeas corpus petitions for alleged enemy combatants.²⁵⁶ Questions about the government's intent are beyond the scope of this Article; however, examining only the effects, the confluence of these government actions appears to interfere with access to counsel and courts in a manner that is not only quantitatively, but also qualitatively, different than interference that a private actor could engender.

The power of government actors is due, at least in part, to their ability to exert legitimized force.²⁵⁷ Beyond the violence imposed on the battlefield, the U.S. government has imprisoned hundreds of men and deprived them of access to the outside world. In many cases, U.S. agents' ability to thwart attorney-client communications resulted from the agents' physical custody of those clients.²⁵⁸ Agents further exploited their position of physical control over the clients by subjecting them to physical, sexual, and emotional abuse.²⁵⁹ At the same time, the power of the U.S. government to designate the location of these prison sites protected the apparent legitimacy of the force exerted, at least temporarily. Those sites include not only Guantánamo, arguably selected to escape judicial scrutiny,²⁶⁰ but also

representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms . . .").

²⁵⁴ Luban, *Guantánamo*, *supra* note 146, at 1981-83 (citation omitted).

²⁵⁵ 18 U.S.C.A. § 2339A(b)(1) (West 2010); *id.* § 2339B(a)(1). Of course courts sometimes sanction the legislature's actions. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (upholding statute).

²⁵⁶ See, e.g., *Boumediene*, 553 U.S. at 764 (striking statute).

²⁵⁷ Blasi, *Checking Value*, *supra* note 61, at 538-39.

²⁵⁸ See Luban, *Guantánamo*, *supra* note 146, at 1989-92.

²⁵⁹ See *Report on Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, CTR. FOR CONST. RTS. (July 2006), available at http://ccrjustice.org/files/Report_ReportOnTorture.pdf (summarizing abuse of detainees).

²⁶⁰ *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (ruling that court had jurisdiction to hear habeas petition of detainee, contrary to position of Executive Branch).

scattered CIA outposts intentionally shielded from public view.²⁶¹

While these theories of government power are compelling, one might find the Guantánamo case study proves too much. The dichotomy between governmental and nongovernmental actors is an attractive categorical system, due in part to its apparent easy application,²⁶² in contrast to that of the other factors described above; however, the rationale for the distinction is not completely firm. Many cases of litigation against government actors do not involve such dire or coercive circumstances for the nongovernmental party. In theory, a government always has the power to resort to the use of force, but to give speech in support of litigation against government actors special recognition, further attention would need to be paid as to how remote a possibility of force would be sufficient to trigger the protection. Additionally, while governmental powers of intrusion and control can reach broadly, this does not make them distinct from those of private actors. The government does not have a monopoly on systematic power. As a concrete example, in the wiretapping case, the U.S. government relied on private telephone companies to conduct the surveillance.²⁶³

B. *Defining the Communications Protected*

The five factors described above highlight the key considerations reflected in Supreme Court jurisprudence on litigation as political expression, as well as a few of the many inherent challenges of such analysis. In addition to identifying the distinguishing features of “political” litigation, developing a theory of attorneys’ communications in support of litigation as expression will require coming to terms with the scope of the communications to be included. The Guantánamo example is an atypical example of litigation as political expression that does not fit squarely within the model of *Button-Primus-Velazquez*. This section draws attention to three areas in which it differs, as they offer three final lessons about the definition of litigation as a form of political expression.

First, one must consider whether fact-gathering communications

²⁶¹ See Petition for Writ of Habeas Corpus, *supra* note 161.

²⁶² For purposes of this Article, I have not considered whether litigation on behalf of a government entity should be protected as political expression. For an interesting examination of government lawyers as cause lawyers, see Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Lawsuits*, 86 DENV. U. L. REV. 457, 480-93 (2009).

²⁶³ See, e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 992-93 (N.D. Cal. 2006) (describing AT&T Corporation’s role in government wiretapping).

should be protected as political speech. *Button* and *Primus* concerned solicitation laws that jeopardized attorneys' access to potential clients, whereas the announced threat of surveillance jeopardizes the Guantánamo attorneys' later communications with clients and other sources of information. The exchange of factual information is different from discussions of political ideas,²⁶⁴ and one might argue that *Button* and *Primus* are better cases for recognition of the communication as political speech because they concerned direct regulation of speech advocating "vindication of legal rights" by the listener.²⁶⁵

Yet fact-gathering communications are no less essential than solicitation. If the lawyer can only agree to represent clients, but cannot conduct any related fact-gathering or theory development, the right to litigate becomes close to useless.²⁶⁶ Solicitation occurs first in time so the litigation can go forward, but discussing the possibility of representation is no more fundamental to the case than factual investigation. Imagine if Ms. Primus could solicit clients, but then the ACLU lawyers were statutorily barred from communicating with the group to learn whether they had been sterilized or whether they received Medicaid assistance. Without the facts, the lawyer could not draft a complaint, let alone prepare the case for trial.²⁶⁷

Focusing on the solicitation as the protected speech is too narrow a reading of the earlier cases. The political expression is the court-directed speech, and the solicitation is simply an extension of it, a recognized prerequisite, protected because otherwise the recognition of litigation as protected speech would be hollow. The real problem with the anti-solicitation law in *Button* was not simply that it blocked the discussion of desegregation, but that it interfered with the NAACP's access to clients needed to challenge desegregation in court. The Supreme Court described as the "gravest danger . . . smothering

²⁶⁴ But see Blasi, *Checking Value*, *supra* note 61, at 603, 610 (highlighting constitutional significance of accessing information).

²⁶⁵ *NAACP v. Button*, 371 U.S. 415, 437 (1963). Comparing the NAACP member to the union member who urges others to utilize federal labor laws and join his union, the Court in *Button* held that encouraging potential plaintiffs to retain the NAACP to pursue litigation challenging school desegregation a protected form of advocacy to persuade others to vindicate their legal rights. "Free trade in ideas means free trade in the opportunity to persuade to action . . ." *Id.* (quotation omitted).

²⁶⁶ See Luban, *Taking Out the Adversary*, *supra* note 242, at 245 (describing how mechanisms that cripple one side turn adversary system into "farce").

²⁶⁷ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (describing First Amendment right to advise clients of claims and bring those claims to judiciary).

all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority."²⁶⁸

The Court has held that solicitation was protected because of its relationship to litigation aimed at promoting beliefs and ideas.²⁶⁹ In contrast, the same day as it released the *Primus* opinion, the Court issued *Ohralik v. Ohio State Bar Ass'n*,²⁷⁰ which recognized no First Amendment interest in solicitation where the litigation had no political motive and the attorney sought only pecuniary gain. Particularly given the strong language in both *Button* and *Primus* regarding the significance of litigation as a form of political expression on behalf of dissident clients and causes, the states' regulation of solicitation in those cases is best understood as an indirect yet unconstitutional burden on the more highly protected expressive activity of courtroom advocacy.

One might argue that the Supreme Court has previously refused to recognize chilling effects on the gathering of information.²⁷¹ Yet the Court in those cases did not credit the factual assertions of chilling effects.²⁷² Additionally, that precedent involved journalists and, while it is undeniable that journalists play a significant role in American democracy,²⁷³ it is not outside the realm of possibility that the Court would make a different rule for lawyers. In *Velazquez*, the Court emphasized that lawyers have a unique role in supporting the functioning of the courts.²⁷⁴

This still leaves the question of which fact-gathering activities should be included within the scope of political expression. The

²⁶⁸ *Button*, 371 U.S. at 434.

²⁶⁹ *In re Primus*, 436 U.S. 412, 424 (1978).

²⁷⁰ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978).

²⁷¹ *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978) (noting skepticism about chilling effects and risks to journalist's sources as result of search of newsroom); *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972) ("[W]e remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify . . ."); see Blasi, *Checking Value*, *supra* note 61, at 602.

²⁷² See. *Zurcher*, 436 U.S. at 566; *Branzburg*, 408 U.S. at 693; see Blasi, *Checking Value*, *supra* note 61, at 602.

²⁷³ One of the major obstacles to granting extended protections to journalists is the difficulty of defining this category of persons. Any individual who created a blog on the internet could arguably claim First Amendment protection as a journalist. Lawyers, on the other hand, are more easily identified, and more easily held accountable for their actions, because they cannot practice without government-approved licenses.

²⁷⁴ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001). Justice Scalia accuses the majority of demonstrating "improper special solicitude for our own profession." *Id.* at 562; see also Barton, *supra* note 28, at 455 n.4.

communications at issue in the Guantánamo case study were primarily between lawyers and third parties, not lawyers and clients. While the information third parties provide may be just as important to the development of a case, stretching the constitutional protection this broadly potentially extends the First Amendment protection even beyond the scope of the attorney-client privilege. Even defining the attorney-client privilege as a First Amendment right could create challenges for existing restrictions on it. To go beyond the privilege seems almost backwards.

Yet the concept of recognizing a category of communications exceeding the scope of attorney-client privilege is not unprecedented; it is reflected in lawyers' confidentiality obligation. Beyond evidentiary and procedural protections, clients also enjoy reassurance of privacy provided by rules of ethics that, with the notable crime-fraud exception,²⁷⁵ prohibit the lawyer's release of information acquired in the course of representing a client. Confidentiality obligations protect a broad scope of information; they apply whenever the lawyer is acting in the course of representation. This includes not only communications with a client but information gained from any source. It even pertains to facts learned accidentally or through observation rather than communication, so long as the lawyer is acting in the course of representation at the time of discovering the relevant information.²⁷⁶ While the lawyer's ethical obligation of confidentiality is based on agency principles²⁷⁷ and therefore may be tied less closely to the adversary system than are the attorney-client privilege and work product doctrine, this definition of the confidentiality obligation arguably shares the values of that system. It reflects a similarly holistic conception of the lawyer's role and recognizes a critical distinction between the lawyer functioning as an advocate and the lawyer functioning as a regular citizen.

Further consideration should be given to the implications of recognizing these broad categories of fact-gathering communications as protected. Although it does potentially constitutionalize a tidal wave of activity, the Supreme Court has already laid the groundwork.

²⁷⁵ In the aftermath of the Enron scandals, this area has been an area of some movement and controversy. See, e.g., Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 1 J. BUS. ENTREPRENEURSHIP & L. 335, 339-61 (2008) (describing Enron scandal and subsequent alterations of lawyers' confidentiality obligations).

²⁷⁶ MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1983).

²⁷⁷ L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 941-42 (1980).

In *Primus*,²⁷⁸ the Court cited Thomas Emerson's article on associational expression²⁷⁹ to describe the relationship between litigation and out-of-court speech essential to it. Emerson explains that the concept of freedom of association, invented by the *Alabama* Court, is better understood as derivative of the freedom of expression than as an independent right.²⁸⁰ Associational conduct, Emerson explains, can amplify and even qualitatively alter expression, and for this reason, he maintained that all associational activities intended to spread messages farther or more effectively ought to be protected based on their expressive purpose.²⁸¹ He includes conduct like renting a concert hall, purchasing supplies, and purchasing sound equipment as forms of expressive association, which, although not literally speech, should be protected as such.²⁸² Under Emerson's theory, the constitutional problem in the *Alabama-Button-Primus* trio was that the government had infringed on activities necessary to realizing effective advocacy.

Emerson's approach significantly widens the scope of protection. It could potentially lead to a First Amendment right to attorney-client privilege, to taking depositions, and to renting a law office. While extending the protection to conduct may go too far, the rationale is compelling and apparently interested the *Primus* Court.²⁸³ Even if extending the protection to conduct seems tenuous, Emerson's perspective supports the notion of broadly protecting speech in support of litigation as political expression.

There remains one final question raised by the Guantánamo case study. Even if communications with witnesses were recognized as protected speech, the burden on that speech is indirect. Incidental burdens on free expression are generally tolerated because of the breadth of government activities that would otherwise be subject to review.²⁸⁴ Particularly given the potential floodgates described above

²⁷⁸ *In re Primus*, 436 U.S. 412, 438 n.32 (1978).

²⁷⁹ Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 26 (1964).

²⁸⁰ *Id.* at 1-2.

²⁸¹ *Id.* at 22.

²⁸² *Id.* at 25.

²⁸³ *In re Primus*, 436 U.S. at 438 n.32.

²⁸⁴ Some scholars have argued that incidental burdens should receive lesser scrutiny, if any, because of the practical impossibility of enacting government regulation that creates no incidental burdens. For a thoughtful defense of the constitutional relevance of incidental burdens, see Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1194-98 (1996). See also Cole, *supra* note 8, at 7 (arguing that guilt-by-association statutes have chilling effect similar to direct

in defining the factual investigations protected, it is tempting to omit consideration of incidental burdens.

The Supreme Court has recognized incidental burdens on litigation in prior cases. Both *Velazquez* and *Alabama* may be interpreted as cases of indirect burdens on expressive activities of litigation. In *Velazquez*, Congress funded only lawyers who refrained from litigating particular claims challenging welfare laws or, in other words, representing clients whose cases presented those claims.²⁸⁵ Regulations restricted LSC counsel directly, but private attorneys were free to pursue such cases, and LSC recipients were free to cease accepting LSC funds.²⁸⁶ As a practical matter, however, the funding restriction threatened the viability of expression challenging welfare laws, and, for this reason, the Supreme Court ruled that the funding restriction violated the First Amendment.

Alabama presents an even more removed relationship between government action and a burden on expressive activity.²⁸⁷ The *Alabama* Court determined that the public revelation of NAACP members' and agents' identities risked exposing them to physical and economic harms by other private citizens and, therefore, the state court's disclosure order constituted "unconstitutional intimidation of the free exercise of the right to advocate."²⁸⁸ To reach this conclusion, the Court inferred from past acts of reprisal imposed on other individuals that future acts would be visited upon current members and agents; that, based on knowledge of those acts, African-Americans would be discouraged from participating in the NAACP in the future; and that the organization's ability to disseminate its political message would thereby be diminished.²⁸⁹ I make no objection to these inferences of logic, but the number of them is worth noting. The Court's willingness to recognize the realities facing the NAACP underscores the Court's concern with providing robust protection for advocates of political litigation.

The Court's willingness to recognize a broad category of communications in support of litigation as entitled to First Amendment protection as political expression is for good reason. Incidental restrictions with a disproportionate burden on protected First Amendment activities, such as an ink tax, will trigger First

censorship of subversive speech).

²⁸⁵ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-37 (2001).

²⁸⁶ *Id.* at 546-47.

²⁸⁷ *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958).

²⁸⁸ *Id.* at 461-63.

²⁸⁹ *Id.*

Amendment scrutiny.²⁹⁰ How far the incidental burdens analysis should extend is beyond the scope of this Article, but the wiretapping of lawyers under the TSP, a program which did have a disproportionate impact on First Amendment activity, reminds us of the importance of the interests at stake. While the scope of protection ought not to extend indefinitely, given the long history of governments indirectly burdening activity they cannot ban outright, recognizing broadly defined incidental burdens may be necessary to protect First Amendment freedoms.²⁹¹

CONCLUSIONS

As of the date of this publication, the Second Circuit Court of Appeals just handed down a decision allowing a group of lawyers, journalists, and others potentially wiretapped under the recent amendments to the Foreign Intelligence Surveillance Amendment Act to challenge the constitutionality of such surveillance.²⁹² Following the Second Circuit's ruling that the plaintiffs have standing to proceed, the lower court must now face the merits of the claims. This case raises First Amendment questions that, up until now in the War on Terrorism, courts have avoided.

The dangers of national security challenge us to grapple seriously with the degree of protection we want to accord lawyers' communications in support of their adversary work. This inquiry ought to reflect the structure of the American adversary system and its philosophical underpinnings. I maintain that the court system and lawyers' work within it promote the same basic values undergirding our freedom of speech jurisprudence: individual liberty, the marketplace of ideas, and, in particular, self-government. The degree of protection we choose to grant to lawyers' communications reflects our commitment to core First Amendment values.

A line of Supreme Court cases dating back half a century provides precedent for defining litigation as political expression, entitled to the highest level of First Amendment protection. The more recent decision of *Velazquez* underscores the special expressive role of the lawyer in the adversary system. The governmental interest in *Button* and *Primus* was insubstantial if not illegitimate and *Velazquez*, while in

²⁹⁰ See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983).

²⁹¹ See sources cited and explanatory parentheticals *supra* note 271.

²⁹² *Amnesty Int'l USA v. Clapper*, No. 09-4112-cv, 2011 WL 941524, at *25 (2d Cir. Mar. 20, 2011).

some ways moving the jurisprudence forward, never explicitly embraced the notion of litigation as political. These cases therefore left questions about the strength and breadth of protection for litigation as expression.

To explore the contours of the protection for litigation in the face of a countervailing government interest more substantial than those in *Button* and *Primus*, this Article examined a case study of attorneys representing Guantánamo detainees under the shadow of warrantless wiretapping. The threat of surveillance restricted the lawyers' ability to engage in fact-gathering communications with clients, witnesses, experts, and others, as well as to explore legal theories with co-counsel and, ultimately, to present evidence and arguments to the courts. The obstacles in individual cases arguably created a chilling effect on litigation that challenged U.S. policies.

Viewing the Supreme Court's earlier jurisprudence in light of the Guantánamo case study, five factors emerge as keys to the definition of litigation as political expression: (1) whether the attorney or client is motivated by a political message; (2) whether the client or potential client is a vulnerable minority; (3) whether the litigation advocates an unpopular or dissident viewpoint; (4) whether the legal services are provided free of charge; and (5) whether there is a government adversary on the other side. The example of warrantless wiretapping reveals new questions that previous cases have not explored but which will now require attention: the constitutional significance of fact-gathering, the scope of communications covered, and the degree of incidental burdens considered for constitutional review. The Guantánamo case study also highlights the First Amendment values that underlie the lawyers' work, thereby reminding us of the importance of tackling these doctrinal puzzles with renewed vigor.

In future research, I hope to explore in more depth the sociological implications of recognizing lawyers' right to engage in communications in support of litigation. I imagine that when disenfranchised clients face strong opposition, in the form of either legal or political obstacles — legal services clients deprived of effective counsel by congressional funding restrictions,²⁹³ or Guantánamo detainees denied access to Article III courts based on their characterization as "enemy combatants"²⁹⁴ — lawyers might best serve

²⁹³ See generally *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking down Congressional restrictions that prevented Legal Services attorneys from challenging welfare laws).

²⁹⁴ See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (ruling on provision of Military Commissions Act that deprived federal courts of jurisdiction over habeas

those clients by articulating claims based on their own rights. As our history demonstrates, the executive and legislative branches of our government have at times stripped vulnerable, unpopular groups of legal claims one might previously have understood them to enjoy. I predict that even when judges are disinclined to credit the claims of despised or disregarded members of society, they might still be empathetic to the claims of the lawyers, whom they view as neutral as to the moral values of the clients' actions and aims, and also as fulfilling a noble obligation in maintaining that neutrality while advancing the clients' positions.

If lawyers advance societal interests through their unique role in the expression of ideas through litigation, as trustees of justice or officers of the court, perhaps they ought to have the enforceable right to bring to the attention of the judiciary impositions on their ability to advocate. This would require that the lawyers hold their own, nonderivative First Amendment rights to express views through litigation. It could permit them to challenge limitations on their advocacy even if their clients did not have the capacity to bring such claims. As the Guantánamo example highlights, if one of the roles of the lawyer is to bring claims to the courts so the judiciary can check excesses of other branches of government, then instilling lawyers with the power to pursue such claims may make sense, because the excesses may include stripping clients or potential clients of any enforceable rights of their own.

corpus petitions for alleged enemy combatants) (citing 28 U.S.C.A. § 2241(e) (West 2007)).